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AUSTRALIA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

REPORT OF THE PANEL

Addendum

BCI deleted, as indicated [[***]]

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS603/R.

LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

PANEL DOCUMENTS

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 21 October 2022

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly provide a non-confidential summary to any Member requesting it, and if possible within 10 days of receiving the request.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If Australia considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. Australia shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. China shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by China should be numbered CHN-1, CHN-2, etc. Exhibits submitted by Australia should be numbered AUS-1, AUS-2, etc. If the last exhibit in connection with the first submission was numbered AUS-5, the first exhibit in connection with the next submission thus would be numbered AUS-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

Questions

8. The Panel may pose questions to the parties and third parties at any time, including:

   a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

   b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 14 and 22 below.

Substantive meetings

9. The Panel shall meet in closed session.

10. The parties shall be present at the meetings only when invited by the Panel to appear before it.

11. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

    (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU, these Working Procedures, and any Additional Working Procedures of the Panel concerning BCI particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

12. Each party shall provide to the Panel the list of members of its delegation no later than 5 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

13. These panel proceedings are being conducted in English. A request by a party for interpretation from one WTO language to another should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

   a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite Australia to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

   b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

   c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

   d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

15. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that Australia shall be given the opportunity to present its oral statement first. The party that presented its opening statement first shall present its closing statement first.

16. Each party shall be given the opportunity to comment on the responses to questions provided by the other party after the second substantive meeting, in accordance with the timetable adopted by the Panel.

17. If, because of the sanitary crisis related to COVID-19 or any other situation, the substantive meetings cannot be physically held in Geneva on the scheduled dates or either party indicates that travel to Geneva will not be possible for its delegation, the Panel may, depending on the circumstances, choose to modify the timetable and/or these Working Procedures after consulting the parties.

Third party session

18. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

19. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session three weeks in advance of this session.

20. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU, these Working Procedures, and any Additional Working Procedures of the Panel Concerning BCI particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

(3) Each third party shall provide, no later than three working days before the third-party session, a list of members of its delegation who will attend the session.

21. To ensure the availability of interpreters, the third parties shall also indicate at least three weeks before the third-party session whether they intend to make their statement in a

WTO language other than English, which is the language in which these panel proceedings are being conducted, and whether they would require interpretation from English to any other WTO language.

22. The third-party session shall be conducted as follows:

    a. All parties and third parties may be present during the entirety of this session.

    b. The Panel shall first hear the oral statements of the third parties. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

    c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

    d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

    e. The Panel may subsequently pose questions to any third party.

    f. Following the third-party session:

        i. Each third party shall submit the final written version of its oral statement, no later than 5 p.m. (Geneva time) on the first working day following the meeting.

        ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

        iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

        iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

23. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

24. Each party shall submit one integrated executive summary. This integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions and first and second oral statements, and may also include a summary of the party's first and second closing statements, responses to questions following the first and second substantive meetings, and comments on the other party's responses following the second substantive meeting. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

25. Each party's integrated executive summary shall be limited to 30 pages.

26. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

27. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments unless that third party indicates that it does not wish for the submission and/or oral statement to serve as its executive summary, in which case it shall submit a separate executive summary.

Interim review

28. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

29. If no meeting is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such written comments shall be limited to the other party's written request for review.

30. If a meeting is requested, the Panel shall consult with the parties on the timing of the meeting and any further written comments.

Interim and Final Report

31. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

32. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

    a. Each party and third party shall submit all documents to the Panel by submitting them via the Disputes On-Line Registry Application (DORA) https://dora.wto.org by 5 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document into DORA shall constitute electronic service on the Panel, the other party, and the third parties.

    b. By 5 p.m. (Geneva time) the next working day following the electronic submission, each party and third party shall submit one paper copy of all documents it submits to the Panel, including the exhibits, with the DS Registry (office No. 2047). The DS Registrar shall stamp the documents with the date and time of the submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format only. In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.

    c. The Panel shall provide the parties with the Descriptive Part of the Report, the Interim Report and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA.

    d. If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to contact the DS Registry (DSRegistry@wto.org).

    e. If any party or third party is unable to meet the 5 p.m. deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned

shall inform the DS Registry (DSRegistry@wto.org) without delay and provide an electronic version of all documents to be submitted to the Panel by email including any exhibits. The email shall be addressed to DSRegistry@wto.org, the Panel Secretary (huijian.zhu@wto.org), the other party and, if appropriate, the third parties. The documents sent by email shall be submitted no later than 5:30 p.m. on the due date established by the Panel. If the file size of specific exhibits makes transmission by email impossible, or it would require more than five email messages, owing to the number of exhibits to be filed, to transmit all of them by email, the specific large file size exhibits, or those that cannot be attached to the first five email messages, shall be filed with the DS Registry (office No. 2047) and provided to the other party and, if appropriate, the third parties by no later than 9:30 a.m. the next working day on an electronic medium acceptable to the recipient. In that case, the party or third party concerned shall send a notification to the DS Registrar, copying the Panel Secretary (huijian.zhu@wto.org), the other party, and the third parties, as appropriate, via email, identifying the numbers of the exhibits that cannot be transmitted by email.

f. In case any party or third party is unable to access a document filed through DORA because of technical difficulties, it shall promptly, and in any case no later than 5 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar, the Panel Secretary (huijian.zhu@wto.org), and the party or third party that filed the document, of the problem by email and shall, if possible, identify the relevant document(s). The DS Registrar will promptly try to identify a solution to the technical problem. In the meantime, the party or third party that filed the document(s) shall, promptly after being informed of the problem, provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry (DSRegistry@wto.org) and the Panel Secretary (huijian.zhu@wto.org) to allow access to the document(s) while the technical problem is being addressed. The DS Registrar may provide an electronic version of the relevant document(s) by email if the affected party or third party so requests. The DS Registrar shall in that case copy the party or third party that filed the document(s) on the email message.

g. Parties and third parties are responsible, through their DORA account administrators, for creating and updating their DORA accounts. The DS Registry is available to provide assistance with managing the DORA accounts.

Correction of clerical errors in submissions

33. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

Parties' agreed procedures for arbitration

34. The Panel takes note of the Agreed Procedures for Arbitration under Article 25 of the DSU in this dispute notified by the parties on 28 April 2022 (WT/DS603/4) and of the joint requests of the parties to the Panel formulated therein.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 21 October 2022

1. For the purpose of this proceeding, business confidential information ("BCI") is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the Australian investigating authority as confidential in the course of the anti-dumping and countervailing proceedings at issue in this dispute.

2. If a party considers that an entity, that submitted BCI relied on in an investigation at issue, is entitled to object to the use of BCI in the proceedings, the party shall provide written notification to the relevant entity that the submitted BCI may be used in the course of the dispute in accordance with these Additional Working Procedures, unless agreed otherwise with the relevant entity. If the entity does not respond to the correspondence, within a reasonable period of time, the parties acknowledge that the entity's BCI may be used in accordance with these Additional Working Procedures.

3. Each party shall assist and facilitate any communication under paragraph 2 to an entity in its territory.

4. No person may have access to BCI except a Panelist, a member of the Secretariat assisting the Panel, an employee of a party or a third party (subject to paragraphs 5 and 6), or an outside advisor to a party or a third party (subject to paragraphs 5 and 6) for the purposes of this dispute. However, an outside advisor is not permitted to access BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the proceedings at issue in this dispute, or an officer or employee of an association of such enterprises.

5. When third parties receive written submissions pursuant to the Working Procedures, the third parties shall receive a version of such written submissions and any exhibits with BCI redacted. The BCI-redacted versions of written submissions and exhibits received by third parties shall be sufficient to convey a reasonable understanding of the nature of the information at issue. Written submissions and exhibits, and their BCI-redacted versions, shall be submitted at the same time.

6. A third party may request access to the BCI version of a BCI-redacted written submission or exhibit received pursuant to the Working Procedures. The Panel, after consulting the parties, shall decide whether to grant access to such BCI, taking into consideration the sensitivity of the information and the need for the third party to see the information for the purpose of participating effectively in the Panel proceedings. Any such request shall include a list of the third party's representatives and outside advisors who would have access to the BCI. If granted, the third party's access to the non-redacted version of a written submission or exhibit containing BCI will take place on the premises of the WTO Secretariat, unless good cause is shown for an alternative arrangement.

7. A person having access to BCI submitted in these Panel proceedings shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

8. When a party or third party includes BCI in a submission or exhibit, the cover and/or first page of the document containing BCI, and each page of the document, shall be marked to indicate the presence of such information. Specifically, the first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. The specific information in question shall be placed between double square brackets, as follows: [[xx.xxx.xx]]. In addition to the above, exhibits containing BCI shall be marked as such also by placing the word "BCI" next to the exhibit number (e.g. Exhibit CHN-1 (BCI)).

9. When BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

10. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 8.

11. When a party or third party submits a document containing BCI to the Panel, the other party and third parties, when referring to that BCI in their documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 8.

12. If a party considers that information submitted by the other party or a third party should have been designated as BCI and objects to such submission without BCI designation, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. Similarly, if a party considers that the other party or a third party submitted information designated as BCI information which should not be so designated, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 1.

13. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

14. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

15. The Panel takes note of the Agreed Procedures for Arbitration under Article 25 of the DSU in this dispute notified by the parties on 28 April 2022 (WT/DS603/4) and of the joint requests of the parties to the Panel formulated therein.

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

1.1. Pursuant to Article 15.3 of the DSU, this Annex sets out the Panel's discussion and disposition of the requests for review made by the parties at the interim review stage. The numbering of paragraphs and footnotes in the Interim Report is the same as in the Final Report.

1.1 General considerations

1.2. In this section, the Panel explains the approach it has taken to certain categories of requests in a more global manner. The Panel will then proceed to focus on those requests made by China and Australia that raise more substantive issues which warrant being set out and discussed individually.

1.3. Certain typographical or formatting errors have been corrected.[1] Additionally, certain editorial improvements have been made to ensure greater consistency, precision and clarity in terminology.[2] A number of paragraphs and footnotes referencing party arguments on particular points have been adjusted where a party requested revisions to more precisely and/or fully reflect its position on the point being summarized.[3] The Panel has also sought to accommodate requests by a party to supplement certain footnote citations with additional references to other relevant paragraphs from its submissions.[4] Certain other conforming edits and editorial revisions have been made. In the instances addressed in this paragraph, the other party did not specifically comment on the request for review. Requests for review on which the other did specifically comment are discussed individually below.

2 CHINA'S REQUESTS FOR REVIEW

2.1 Paragraph 7.18

2.1. China requests that the Panel replace the phrase "'one indivisible, continuous measure'" in paragraph 7.18 with the phrase "one indivisible, continuous set of measures in each respect", and revise footnote 75 to cite "China's response to Panel question No. 38, para. 118 and China's second written submission, para. 45". China asserts that this would more accurately reflect the development of China's arguments during the course of the dispute. In the alternative, China requests that the Panel remove the sentence containing this phrase.[5]

2.2. Australia argues that China's request is inappropriate because the current language accurately reflects China's argument at the first meeting. However, Australia suggests alternate language for the paragraph in question that Australia considers to be acceptable.[6]

2.3. The Panel has amended the language of the paragraph and revised footnote 75 to more accurately reflect the development of China's arguments during the course of the dispute.

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[1] These changes occurred, among others, in paras. 7.32, 7.34, 7.248, 7.282, fns 68, 107, 175, 203, 223, 227, 284, 285, 343, 469 and 491.

[2] We agree with Australia's suggestion that we use a capital "G" for Government when referring to the Government of China or Australia. (Australia's request for interim review, section III.2.e). We have made the relevant corrections throughout the Interim Report.

[3] These changes occurred in paras. 7.13, 7.17, 7.19, fns 502 and 526.

[4] These include additions to fns 52, 53, 59, 81, 144, 167, 282, 482, 511, 587, 595, and 605. The Panel has made such changes without prejudice to its understanding that, when a panel elects to include footnote citations referencing one or both parties' submissions on a particular point, the panel is free to provide a pinpoint citation to the paragraph(s) the panel considers relevant, as opposed to exhaustively referencing all relevant paragraphs from the parties' written submissions, oral statements, responses to panel questions, and/or associated comments.

[5] China's request for interim review, section C.

[6] Australia's comments on China's request for interim review, section II.

2.2 Paragraph 7.20

2.4. China requests that the Panel use the word "clarifies" instead of "contends" in the final sentence of paragraph 7.20 because, in China's view, "contends" improperly implies a contention of evidentiary fact, and also suggests that Australia can revise China's claims.[7]

2.5. Australia considers this suggested change inappropriate mainly because "[n]either China, nor Australia, was able to change or 'clarify' the legal effect of those claims after the panel request was submitted – although both were entitled to make submissions about the scope of those legal claims". However, Australia suggests that the Panel could use "submits" or "argues" in place of "contends".[8]

2.6. The Panel has revised the language in question to more accurately reflect China's arguments.

2.3 Paragraph 7.22

2.7. China requests that the Panel revise the language in the first sentence of paragraph 7.22, and footnote 85, in a manner similar to that requested by China *vis-à-vis* paragraph 7.18, discussed further above.[9]

2.8. Australia considers that, in the context of the sentence as reframed by China, the insertion of the word "clarifies" rather than "characterizes" would mean the sentence would read as if the Panel accepted that "clarification", rather than it being an account of China's submission. Australia does not oppose the other changes to the sentence requested by China, but if they are made, in Australia's view, the phrase "clarifies that" should not be included, and instead either "characterizes" should be retained, or the sentence should read "China clarifies that its submission is that the measure is an 'indivisible, continuous set of measures in each respect'".[10]

2.9. The Panel has amended the language of paragraph 7.22 and footnote 85 in a manner consistent with the changes that the Panel has made to paragraph 7.18.

2.4 Paragraph 7.35

2.10. China suggests that the Panel insert "Australia argues that" at the beginning of the sentence beginning with "[s]uch expiry arguments" because, in China's view, the sentence without the suggested phrase might be read to indicate that the Panel disagrees with the notion that the Panel has jurisdiction to rule on expired measures.[11]

2.11. Australia opposes China's proposed change because, in Australia's view, the sentence is accurate as written and the suggested change would make the sentence confusing.[12]

2.12. The Panel has altered the sentence to further clarify the sentence and to reflect that the Panel is not indicating that it accepts that expired measures are *ipso facto* outside the Panel's terms of reference.

2.5 Footnote 675

2.13. China requests that the Panel amend the last sentence of the footnote to clarify its language. Specifically, China indicates that it is unclear to what the words "case" and "situation" refer to in the last sentence.[13]

2.14. Australia considers that the "'situation' referred to is the 'more general legal situation' referred to in the immediately preceding sentence". Australia considers that no additional clarification is required, but does suggest alternative phrasing for the sentence, i.e. revising "situation" to read "more general situation". However, Australia agrees with China that the phrase "even in that case"

[7] China's request for interim review, section E.
[8] Australia's comments on China's request for interim review, section III.
[9] China's request for interim review, section F.
[10] Australia's comments on China's request for interim review, section IV.
[11] China's request for interim review, section I.
[12] Australia's comments on China's request for interim review, section V.
[13] China's request for interim review, section J.

in the final sentence of footnote 675, is ambiguous. Australia suggests deleting the phrase or replacing it with the words "in the case of the ADC's initiation decision with respect to Program 1".[14]

2.15. The Panel has revised the footnote to clarify its language. The Panel generally finds Australia's suggestions on how to clarify the language reasonable, and has made clarifications to the footnote's language along the lines Australia suggests.

3 AUSTRALIA'S REQUESTS FOR REVIEW

3.1 Section 7.1.2 (Standard of review)

3.1.1 Paragraph 7.6

3.1. Australia requests that the Panel add a reference to Article 17.6(ii) of the Anti-Dumping Agreement in the section addressing the Panel's standard of review.[15]

3.2. China objects to Australia's request. China considers that the Panel did not rely on Article 17.6(ii) in its Interim Report to decide any issue. China further considers that the ruling of the arbitrators in *Colombia – Frozen Fries* did not involve the application of Article 17.6(ii). Finally, China argues that the Panel has referred to Article 17.6(ii) under the heading of "Treaty Interpretation" and there is no need to repeat this provision in the context of the "standard of review" section.[16]

3.3. We have referred to Article 17.6(ii) of the Anti-Dumping Agreement at paragraph 7.3 of the Interim Report, addressing treaty interpretation. Thus, we consider it unnecessary to refer to this provision again in the section dealing with the Panel's standard of review.

3.1.2 Proposed new "Burden of proof" section

3.4. Australia requests that the Panel include a section discussing burden of proof in the beginning part of the Report "for clarity and consistency of the Report". Australia argues, in particular, that a burden of proof section is required because the Panel has "in many cases, [found] that China has failed to present a *prima facie* case in advancing certain claims in this dispute".[17]

3.5. China objects to Australia's request. China argues that the Panel's reasoning with respect to China's claims is clear, subject to its requests for review of precise aspects of the Interim Report. Further, China argues that there is no requirement for a panel to include a separate section on "burden of proof" and that whether to include such a section is within the Panel's discretion. According to China, the Panel's choice of not including such a section in the Report does not impact the resolution of this dispute.[18]

3.6. We consider it within our discretion to set out certain relevant and pertinent general principles in our Report. We note that some previous panels have included a section on burden of proof in their reports while others have not. In the present case, we do not find it necessary to include a burden of proof section.

3.2 Section 7.2 (Expiry of measures and Australia's challenges under Article 6.2 of the DSU)

3.2.1 Paragraph 7.21

3.7. Australia requests that the Panel add the following italicized sentence to paragraph 7.21: "Also, according to Australia, China failed to mention the wind towers expiry review in its first written submission with respect to any claim except AD claim 6.a. *Similarly, Australia submitted that China made no reference to the stainless steel sinks expiry review and interim reviews in its first written*

[14] Australia's comments on China's request for interim review, section VI.
[15] Australia's request for interim review, section II.1.a.
[16] China comments on Australia's request for interim review, section II.1.a.
[17] Australia's request for interim review, section II.1.b.
[18] China comments on Australia's request for interim review, section II.1.b.

submission with respect to AD claims 1, 3, 4 and 7(a)". Australia considers that an appropriate footnote reference would be to paragraph 131 of Australia's second written submission.[19]

3.8. China considers that Australia's suggested change is unnecessary because the report already adequately summarizes the parties' arguments in this context.[20]

3.9. The Panel has revised the language of the paragraph to further clarify Australia's arguments.

3.2.2 Paragraph 7.24

3.10. Australia requests that the Panel make certain changes to this paragraph concerning the use of the word "essence". First, Australia considers that China used the word "essence" as indicating that there were no changes as between the original investigations and the subsequent interim and expiry reviews, whereas the Panel appears to characterize China's argument, and Australia's response thereto, as different. Second, Australia considers that Australia did not argue "that the essence of certain such aspects did change between the investigations and interim reviews and expiry reviews", as stated in paragraph 7.24, but instead argued that there were factual differences with respect to both the findings and methodologies employed by the ADC between the original investigations and the subsequent reviews. Third, Australia considers that Australia did not argue that if there were "no essence change as between the investigations and expiry reviews, then the panel could only make findings with respect to the expiry reviews", but rather argued "that in a hypothetical situation, where there were no changes in methodology between the original and expiry review, then 'the panel in that entirely different scenario could make findings with respect to the latest-in-time expiry reviews under the principle of judicial economy'".[21] Australia therefore requests that paragraph 7.24 be amended to reflect these considerations. Additionally, for increased clarity, Australia requests that the Panel mention that the "essence" concept used by the Panel is different from the "essence" concept advanced in by China in its submissions.[22]

3.11. China considers that Australia's request is unnecessary because the request "proceeds in the same obfuscatory manner as the procedural complaints and technicalities that Australia employed in the proceedings before the Panel". China also indicates that China sees no finding in the Interim Report to the effect that arguments advanced by China related to essence are legally irrelevant, as Australia appears to suggest.[23]

3.12. The Panel has revised the paragraph in question to further clarify the parties' arguments in this context.

3.2.3 Paragraph 7.35

3.13. Australia requests that the Panel revise paragraph 7.35 as follows to reflect its arguments more accurately: "Australia argues that the measures have expired because the ADC found that Program 1 conferred no benefit to Chinese exporters in the expiry review **and that it was not a countervailable subsidy. The ADC, therefore, terminated all countervailing duties and other measures associated with Program 1** ~~assigning a zero countervailing duty rate to that programme~~".[24]

3.14. China considers that Australia's request is unnecessary. China asserts that the basis for Australia's arguments concerning the expiry of Program 1 was that the Australian investigating authority determined that Program 1 was not countervailable as it did not confer a benefit, a determination that the Panel recorded to in its Report. However, in China's view, the Panel never finds in its Report that the countervailing measure with respect to Program 1 expired. China therefore finds particularly objectionable Australia's request to include the language to the effect that "[t]he

[19] Australia's request for interim review, section II.2.a.
[20] China's comments on Australia's request for interim review, section II.2.a.
[21] Australia's request for interim review, section II.2.b (quoting Australia's response to Panel question No. 70, para. 41).
[22] Australia's request for interim review, section II.2.b.
[23] China's comments on Australia's request for interim review, section II.2.b.
[24] Australia's request for interim review, section II.3.a. (bold type and strikeout original)

ADC, therefore, terminated all countervailing duties and other measures associated with Program 1".[25]

3.15. The Panel has amended the language in the paragraph to more clearly reflect Australia's arguments.

3.2.4 Section 7.2.3 (Australia's claims under Article 6.2 of the DSU)

3.16. Australia requests that the Panel reconsider paragraphs 7.46 to 7.50 of the Interim Report, which addresses the function of China's claim under Article 9.3 of the Anti-Dumping Agreement in conjunction with Australia's argument that it was necessary for China to cite Article 11.3 of the Anti-Dumping Agreement in order to bring claims under the Anti-Dumping Agreement *vis-à-vis* expiry reviews. In particular, Australia argues that without a reference to Article 11.3 of the Anti-Dumping Agreement in a panel request, the panel request cannot be said to have provided "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" as required by Article 6.2 of the DSU. In other words, Australia argues that, without a citation to Article 11.3 in a panel request, the respondent is not put on notice that expiry reviews are being challenged.[26]

3.17. China considers that Australia's request for reconsideration of this portion of the Report is unnecessary. China notes, in particular, that: (a) panels can address issues in ways not raised by the parties; (b) Australia never properly supported its position that "Article 11.3 is the starting provision for all claims connected with the calculation of the dumping margin during an expiry review"; (c) the panel request, contrary to Australia's assertions, identified the expiry reviews and made claims under Articles 2 and 9.3; and (d) the Panel's reasoning in this context is sound.[27]

3.18. The Panel considers that the Interim Report, as written in this context, effectively conveys the Panel's consideration of this issue. The Panel has, however, added a sentence further to clarify that a reference to Article 11.3 of the Anti-Dumping Agreement was not, in this case, necessary to satisfy the requirements of Article 6.2 of the DSU.

3.3 Section 7.3.1.1 (Legal framework)

3.3.1 Paragraph 7.57

3.19. Australia requests, to increase the clarity of the Report, that paragraph 7.57 be amended as follows: "In the underlying investigation in that dispute, the ADC **~~relied on~~ considered** the same statutory language as in the underlying proceedings here." Australia, in particular, argues that the language as written may improperly suggest that the ADC conflated the concept of "competitive market costs" in its domestic legislation with that of the second condition of the first sentence of Article 2.2.1.1.[28]

3.20. China considers Australia's requested change unnecessary. China sees no ambiguity in the sentence to which Australia refers. In response specifically to Australia's position that the language in question suggests a conflation of the ADC's consideration of "competitive market costs" with the second condition of the first sentence of Article 2.2.1.1, China notes the following sentence of the Interim Report states: "[t]he panel found that the ADC had made no finding as to whether the second condition had been fulfilled when rejecting exporters' costs".[29]

3.21. The Panel considers the requested change reasonable and therefore has implemented it. The change also, in the Panel's view, further clarifies that the claim being addressed by the panel in the dispute in question was not an "as such" finding with respect to Australian legislation.

[25] China's comments on Australia's request for interim review, section II.3.a.
[26] Australia's request for interim review, section II.4.
[27] China's comments on Australia's request for interim review, section II.4.
[28] Australia's request for interim review, section II.5.a. (bold type and strikeout original)
[29] China's comments on Australia's request for interim review, section II.5.a.

3.3.2 Paragraph 7.58

3.22. Australia requests that paragraph 7.58 reflect Australia's textual arguments concerning the meaning of the first sentence of Article 2.2.1.1 and cite paragraphs 182-191 of its first written submission and paragraphs 149-186 of its second written submission in this context.[30]

3.23. China objects to Australia's request. In particular, China considers that panels do not need to detail every argument made by a party in its Report and asserts that China also made arguments on the same subject-matter to the Panel.[31]

3.24. The Panel has made changes to footnote 137 to this paragraph to reflect Australia's arguments more fully.

3.3.3 Paragraph 7.59

3.25. Australia requests that the Panel revise paragraph 7.59 to reflect Australia's argument that the interpretation of the first sentence of Article 2.2.1.1 by the panel in *Australia – Anti-Dumping Measures on Paper* should not be followed because it was inconsistent with the plain text of the Anti-Dumping Agreement.[32]

3.26. China considers that no review of this aspect of the Interim Report is needed because China sees nothing improper regarding the language as drafted.[33]

3.27. The Panel has added certain text to footnote 137 in this section to more fully reflect Australia's arguments in this context.

3.4 Section 7.4.2.2 (Main party arguments)

3.4.1 Paragraph 7.154

3.28. Australia requests that the Panel revise paragraph 7.154 to include the bolded language as follows:

> Rather, according to Australia, the ADC acknowledged that it needed to make findings specifically with respect to the strictures of the second condition of Article 2.2.1.1, and then did so by finding that the exporter's records **reflected 304 SS CRC costs that** were distorted by the Chinese government's interventions in the steel market. [fns. removed for the purposes of this document][34]

3.29. China considers Australia's requested change to be unnecessary. In China's view, the relevant language in the Interim Report, when read in context with the footnotes, is sufficiently clear and already captures what Australia advocates.[35]

3.30. The Panel has made the suggested change to further clarify the relevant sentence.

3.5 Section 7.4.4.1 (Main party arguments)

3.5.1 Paragraph 7.172 and footnote 323

3.31. Australia requests that the Panel revise paragraph 7.172 to include the bolded language as follows to more fully capture submissions made with respect to AD Claim 2:

> In light of such observations, Australia concludes that this claim is dependent on China's other Article 2.2 claim, discussed in the section immediately above**, insofar as**

[30] Australia's request for interim review, section II.5.b.
[31] China's comments on Australia's request for interim review, section II.5.b.
[32] Australia's request for interim review, section II.5.c.
[33] China's comments on Australia's request for interim review, section II.5.c.
[34] Australia's request for interim review, section II.6.a.
[35] China's comments on Australia's request for interim review, section II.6.a.

> **this claim concerns the stainless steel sinks investigation**. [footnote 323] **With respect to the interim and expiry reviews, Australia submits that for AD claim 2 China cannot have made a *prima facie* case for the interim and expiry reviews because it has not addressed the differences in the ADC's OCOT assessment between the investigation and the interim and expiry reviews, or advanced any separate arguments. [new footnote]**

3.32. Australia also requests that the Panel: (a) amend footnote 323 to include the following bolded language: "Australia's first written submission, para. 410~~.~~**; Australia's response to Panel question No. 5, paras. 1-2; Australia's response to Panel question No. 69, para. 27.**"; and add the following new footnote: "Australia's response to Panel question No. 69, para. 28".[36]

3.33. China considers that Australia's request to include a reference to the stainless steel sinks investigation is unnecessary. China notes that this paragraph refers to "the section immediately above", i.e. section 7.4.3, which refers to "surrogate costs for 304 SS CRC". China further indicates that the Interim Report also makes reference to Australia's first written submission which refers to "stainless steel sinks". China also argues that Australia's requests are improper because Australia seeks to "set out its opinions of its arguments … as well as interpreting China's submissions to the Panel".[37]

3.34. The Panel has revised the language of the paragraph and accompanying footnote to more fully reflect Australia's arguments.

3.5.2 Paragraph 7.174

3.35. Australia requests, to reflect Australia's arguments more accurately, that the Panel revise paragraph 7.174 as follows:

> **In answer to a question from the Panel** Australia also argues~~d~~ that there **were differences** ~~was a change of essence as~~ between the investigation and expiry review, **which China's arguments did not engage with**, because in the investigation the ADC used the price of North American and European prices for 304 SS CRC published by MEPS (International) Ltd.[38]

3.36. China indicates that this request "is a clear example of Australia seeking to clarify something needlessly and in a manner that adds nothing to the interim report. There can be no doubt that Australia argued '[t]here is no 'essence'". China also considers that Australia's arguments regarding "differences" between different segments were effectively arguments concerning the "essence" of the challenged measures.[39]

3.37. The Panel has revised the language in the paragraph to more clearly reflect Australia's arguments.

3.6 Section 7.4.9.1 (Main party arguments)

3.6.1 Paragraph 7.269

3.38. Australia argues that the Panel's statement at paragraph 7.269 that the ADC relied on "facts available" is incorrect and requests the following amendment to paragraph 7.269:

> According to Australia, the ADC therefore had **regard to the evidence before it** ~~to resort to facts available~~, which included substantial evidence that there was significant government intervention in the Chinese iron and steel industry that distorted prices for various steel outputs.[40]

[36] Australia's request for interim review, section II.7.a. (bold type and strikeout original)
[37] China's comments on Australia's request for interim review, section II.7.a.
[38] Australia's request for interim review, section II.7.b. (bold type and strikeout original)
[39] China's comments on Australia's request for interim review, section II.7.b.
[40] Australia's request for interim review, section II.8.a. (bold type and strikeout original)

3.39. China objects to Australia's request. China refers, in particular, to Australia's response to Panel question No. 75, para. 62.a that:

> In Railway Wheels Report 446, the dumping margin for what is described as "all other exporters" from China was determined on the basis of facts available.[41]

3.40. China argues that if the Panel were to accede to Australia's request, the relevant sentence should be changed to "… resort to available information, which Australia claimed included substantial evidence …".[42]

3.41. We note that at paragraph 595 of its first written submission Australia states that "the ADC resorted to the evidence available to it, including findings from previous investigations". To more accurately reflect Australia's submission, we have modified paragraph 7.269, using the same wording as used by Australia at paragraph 595 of its first written submission.

3.7 Section 7.4.10.1 (Main party arguments)

3.7.1 Paragraph 7.281

3.42. Australia argues that the Panel's summary of its arguments at paragraph 7.281 of the Interim Report "misses some nuances" associated with its responses to the Panel's question Nos. 91 and 92. Australia requests the Panel to make the following amendments:

> Australia underlines that, in its view, **the systematic series of actions was evidenced by** the ADC's analysis of the conferral of a benefit under Program 1 to selected exporters in the investigation**. ~~was sufficient to establish the *de facto* specificity of Program 1. and that~~ Australia submits, given that the identification of a subsidy programme is a case-by-case analysis,** no further analysis was needed with respect to any other entities that may have received financial contributions or associated benefits under Program 1.[43]

3.43. China objects to Australia's request. China argues that the Panel has both reported the "nuance" that Australia is concerned about in the first sentence of the paragraph and has then expressed its own view of what Australia's argument amounts to in a later sentence. According to China, Australia's request contradicts the Panel's expressed views and adds nothing.[44]

3.44. We have decided to accept some of the modifications requested by Australia to better reflect Australia's arguments.

3.8 Section 7.5.1.1 (Main party arguments)

3.8.1 Paragraph 7.305

3.45. Australia requests that the Panel revise its language in this paragraph and footnote 583 to reflect that the ADC made, according to Australia, a first condition finding in the railway wheels investigation. In particular, Australia argues that the first condition finding was evident from such a finding being present in the statement of essential facts.[45]

3.46. China considers that no review of this aspect of the Interim Report is necessary because the existing language in question is supported by the record.[46]

3.47. The Panel has revised the language of the paragraph and footnote 583 to reflect Australia's arguments more clearly in this context. However, we do not revise our conclusion in this

[41] China comments on Australia's request for interim review, para. 59 (quoting Australia's response to Panel question No. 75, para. 62.a).
[42] China comments on Australia's request for interim review, section II.8.a.
[43] Australia's request for interim review, section II.9.a.
[44] China comments on Australia's request for interim review, section II.9.a.
[45] Australia's request for interim review, section II.10.a.
[46] China's comments on Australia's request for interim review, section II.10.a.

context because the statement of essential facts, in our view, does not represent the relevant findings of the ADC.

3.9 Section 7.5.1.2 (Evaluation)

3.9.1 Paragraph 7.309

3.48. Australia requests that, further to its request addressed directly above, that the Panel revise its language in this paragraph to reflect that the ADC made, according to Australia, a first condition finding in the railway wheels investigation.[47]

3.49. China considers that no review of this aspect of the Interim Report is necessary essentially for the same reasons as those stated above with respect to paragraph 7.305.[48]

3.50. The Panel has revised the language of the paragraph and footnote 600 to more clearly reflect Australia's arguments in this context and to be consistent with the changes the Panel made to paragraph 7.305, discussed in the section directly above.

3.10 Footnotes and typographical errors

3.10.1 Footnote 158

3.51. Australia considers the Panel has inaccurately recorded Australia's arguments in this footnote. Australia considers that at no point did it suggest that the second condition finding was "implicit" in the ADC's findings. As such, Australia requests the following revision to footnote 158:

> We also note that neither China nor Australia consider that the ADC's method of rejecting TSP's relevant costs was materially different as between the investigation and expiry review. Australia indicates that in both the investigation and expiry review the ADC issued no second condition finding in the express language of Article 2.2.1.1, but, in both cases, the **negative** finding was **nonetheless evident ~~somehow implicit in~~ from** the **reports ~~conclusion that TSP's costs did not reflect competitive market costs~~**. (Australia's response to Panel question No**s**. **61, para. 195 and** 78, paras. 110-119).[49]

3.52. China considers that no review of this aspect of the Interim Report is necessary because the Panel's characterizations of Australia's position in this context are reasonable.[50]

3.53. The Panel has revised the language of the footnote to more accurately reflect Australia's submissions in this context.

3.10.2 Footnote 302

3.54. Australia considers the Panel's summary of Australia's submission on the second condition finding in the stainless steel sinks investigation to be incomplete. Australia therefore requests the following amendments to footnote 302: "We note that Australia argues that, **while not made expressly in the language of Article 2.2.1.1, a negative finding under the second condition is evident in the report. Australia submitted that** the ADC understood that it had to make a finding under the second condition of Article 2.2.1.1, as evidenced by the ADC's statement that:" and "We ultimately find such statements immaterial because they do not amount to findings under the second condition. **See, also, Australia's SWS, paras. 238-244; Australia's responses to Panel question No. 61, para. 194 and No. 78, paras. 85-91**".[51]

[47] Australia's request for interim review, section II.11.a.
[48] China's comments on Australia's request for interim review, section II.11.a.
[49] Australia's request for interim review, section III.1.h.
[50] China's comments on Australia's request for interim review, section III.1.h.
[51] Australia's request for interim review, section III.1.o. (bold type original)

3.55. China's position is the same here as it was for footnote 158, discussed directly above.[52]

3.56. The Panel has revised the language of the footnote in a manner consistent with its treatment of footnote 158, discussed directly above.

3.10.3 Footnote 439

3.57. Australia argues that the first sentence of this footnote may be understood as a general statement of principle that prices paid for accessories purchased from third parties can never reflect its profit inclusive of market value. Australia requests that the Panel add the words "paid by Primy" to clarify that the statement pertains to the specific circumstances of Primy in the present case.[53]

3.58. China objects to Australia's request. China argues that, first, the Panel states clearly that the comments in the footnote relate to "Australia's argument during these proceedings". Second, China argues that the footnote makes clear that the consideration undertaken by the Panel was of "the profit generated by the third-party supplier, rather than the profit generated by Primy when the accessories were resold".[54]

3.59. In light of our use of the words "Australia's argument during these proceedings" and the references to "the profits generated by Primy", we do not consider that our formulation of the first sentence of footnote 439 is likely to lead to the misunderstanding pointed to by Australia. Nevertheless, we have decided to insert the additional words requested by Australia for purpose of clarity.

3.10.4 Footnote 494

3.60. Australia requests the Panel to delete reference to page 139 of the Investigation 238 Final Report, (Exhibit CHN-2) because page 139 does not refer to Program 1.[55]

3.61. China notes that the Panel may have intended to refer to page 137 of the Investigation 238 Final Report, (Exhibit CHN-2) which refers to Program 1. If so, China argues that a correction, rather than deletion, is warranted.[56]

3.62. We have changed the page number from 139 to 137 in footnote 494 as that is, in our view, a more appropriate reference.

3.10.5 List of Annexes

3.63. Australia submits that Annex C-2 "Integrated executive summary of the arguments of Canada" and the references to it in the Interim Report could be deleted because, in its view, Canada did not make any written or oral submissions in relation to this dispute and did not submit an integrated executive summary.[57]

3.64. Paragraph 27 of the Panel's Working Procedures provides that a third-party submission and/or oral statement shall serve as the executive summary of that third party's arguments if it does not exceed six pages in total, unless that third party indicates that it does not wish for the submission and/or oral statement to serve as its executive summary, in which case it shall submit a separate executive summary. Canada did not indicate to the Panel that it does not wish for its oral statement at the third-party session to serve as its executive summary. For this reason, we consider Canada's oral statement at the third-party session to be its executive summary for the purpose of paragraph 27 of the Panel's Working Procedures.

[52] China's comments on Australia's request for interim review, section III.1.o.
[53] Australia's request for interim review, section III.1.q.
[54] China comments on Australia's request for interim review, section III.1.q. (underlining original)
[55] Australia's request for interim review, section III.1.t.
[56] China's comments on Australia's request for interim review, section III.1.t.
[57] Australia's request for interim review, section III.2.a.

3.10.6 Paragraph 7.111

3.65. Australia suggests, because there was only one exporter (TSP) in the context of wind towers, following revision to the paragraph: "… the ADC to reject **the** exporter'**s** record costs for steel plate in constructing normal value".[58]

3.66. China considers that no review of this aspect of the Interim Report is necessary because the existing sentence is correct and no purpose is served by altering it in the requested manner. As context, China indicates that the information used by the ADC to calculate the uncooperative and all others-rate in this context was information from TSP.[59]

3.67. The Panel has made the suggested change to increase the clarity and consistency of the Panel's discussions surrounding wind towers.

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[58] Australia's request for interim review, section III.2.b. (bold type original)
[59] China's comments on Australia's request for interim review, section III.2.b.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

A China's AD claims

A.1 AD claim 1
Australia used non-country of origin costs in working out the cost of production in the country of origin

1. ADA Article 2.2 allows the margin of dumping to be determined by comparison with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2. In imposing anti-dumping measures against Chinese exports of wind towers, Australia used a mix of information about costs, some from Chinese Taipei and the Republic of Korea, to create artificial "costs", unfounded in any market. The record reveals no consideration or recognition by Australia of the required adaptation of the information to arrive at the cost of production in the country of origin. That information was used to apply "uplifts" to the exporter's actual cost of plate steel and flanges. Australia denies that non-China costs were used to work out the cost of production of wind towers. The record discloses otherwise.

3. In imposing anti-dumping measures against Chinese exports of stainless steel sinks, Australia used a MEPS (data agency) 304 SS CRC "benchmark" for Europe and North America in place of the Chinese exporters' actual costs of stainless steel. The out-of-country "benchmark" was then adjusted for Chinese exporters' delivery costs and per tonne splitting costs. Australia claims that North American and European prices, with those adjustments, were an appropriate proxy for the cost of production of stainless steel sinks in China. This cannot be sustained. A revised method in a later review – the replacement of the MEPS benchmark with an SBB benchmark – simply magnified the artificiality of the exercise.

4. In imposing anti-dumping measures against Chinese exports of railway wheels, Australia used a French steel billet price in place of the Chinese exporter's actual costs of raw materials used to make railway wheels and its costs of converting the raw materials into steel billet. Australia argues that it "adjusted" the French steel billet price in arriving at the cost of production of railway wheels in China in an "appropriate" manner. It did so by deducting the selling, general and administrative expenses of a European steelmaker Arcelor-Mittal from the French steel billet price. These practices cannot hope to arrive at an input cost in China.

5. China has explained how the Appellate Body report in *EU – Biodiesel* made clear that "cost of production … in the country of origin" is to be understood as a reference to the price paid or to be paid to produce something within the country of origin. The Appellate Body also stated that whatever information is used to establish the cost, it must be used to arrive at the cost of production in the country of origin. In the same report the Appellate Body faulted the European Union for using a surrogate cost for the purpose of removing perceived distortions in the cost in the country of origin. That was found to be antithetical to the clear words of Article 2.2 which provide that a proxy for a normal value based on domestic selling price can be the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. The primacy of Article 2.2 has also been made quite clear by the Appellate Body in its report in *Ukraine – Ammonium Nitrate*. It is there stated that costs calculated on the basis of records kept by the exporter or producer under Article 2.2.1.1 must lead to a cost of production in the country of origin.

6. Accordingly, Australia's practices in the cases at issue do not comply with ADA Article 2, which provides that the margin of dumping may be determined by comparison of the export price with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. In all cases Australia failed to work out the cost of production in China of the subject products, and in no case were the substituted

costs of production established in a manner that could serve to arrive at the cost of production in China.

A.2 AD claim 2
Australia used non-country cost of production in applying the ordinary course of trade test to stainless steel sink exporters

7. ADA Article 2.2.1 employs an exporter's cost of production plus a reasonable amount for administrative, selling and general costs in the application of the ordinary course of trade test, pursuant to which sales may be disregarded in determining normal value by reason of price.

8. The cost of production to be used in the below cost test under Article 2.2.1 must comply with the requirement to use the exporter's cost record under Article 2.2.1.1 and ultimately must be the cost in the country origin under Articles 2.1 and 2.2. The non-compliance adverted to by China in AD claim 1 with respect to stainless steel sinks also renders Australia's application of that test non-compliant with its obligations. This is because the cost of production used in the application of that test was not the cost of production of the exporters' stainless steel sinks in China, being the country of origin.

9. Australia offers no substantive defence other than to reiterate its defence with respect to AD claim 1. As stated, Australia's claim that North American and European prices were an appropriate proxy for the cost of production of stainless steel sinks in China is unsustainable.

A.3 AD claim 3
Australia used non-record costs that were not actually incurred in working out the cost of production

10. ADA Article 2.2.1.1 states that for the purpose of paragraph 2 costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

11. In imposing anti-dumping measures against Chinese exports of wind towers, stainless steel sinks and railway wheels, Australia did not calculate the exporters' costs on the basis of their records. As stated with respect to AD claim 1, Australia's cost of production calculations were infected by uplifting the exporters' actual costs using outside China costs, or substituting the exporters' actual costs using cost "benchmarks" and prices derived outside China, or using non-costs or costs of a type the exporters did not incur. No adaptation was applied to the out-of-country cost information to arrive at the cost in the country of origin. Ultimately, none of these costs were exporter record costs.

12. Initially, China's argumentation concerning China's AD claim 3 focussed on the well-founded legal principle that requires a determination to be made about the applicability of a rule before considering the applicability of a derogation to that rule. The architecture of the first sentence of Article 2.2.1.1 insists that costs shall normally be calculated on the basis of records kept by the exporter if they are in accordance with generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product concerned. Deciding whether the rule applies – that the exporter's record is available to be used – is logically and legally anterior to an inquiry about the existence and applicability of any derogation that may arise from the "shall normally" wording in the sentence. This approach also respects and applies the approach adopted by the panel regarding precisely the same issue in *Australia – Anti-Dumping Measures on Paper*.

13. In its defence, Australia argued, in its first written statement:

    (a) that in the railway wheels case it did not rely on a failure of the exporter's records to meet the second condition of the first sentence in disregarding the records, rather it relied on its perception that the circumstances in which the exporter's steel billet costs were formed were "not normal or ordinary"; and

(b) that in the stainless steel sinks case it had first determined the applicability of the rule, and in so doing found the second condition in the first sentence, that the exporters' records reasonably reflect the costs associated with the production and sale of the product concerned, had not been met with respect to any of those records.

14. Australia initially presented no coherently explained defence with respect to AD claim 3 in the wind towers case.

15. In its second written statement, Australia then followed up its initial defence by doubling down on its opinion that the second condition of the first sentence had not been met with respect to the records of the stainless steel sink exporters, and that this had been properly determined. Australia clarified that this was also its defence with respect to the determination not to use the wind tower exporter's records. Australia also reiterated its defence with respect to the railway wheels exporter, which was that its determination not to use the exporter's record was because the circumstances in which the exporter's steel billet costs were formed were "not normal or ordinary". Australia admits that it did not make a second condition finding with respect to the records of the railway wheels exporter but rejects the proposition that there is an order of analysis that required it to make such a finding before relying on its "not normal or ordinary" excuse to disregard the records.

16. In rebuttal of Australia's variously and implausibly explained defences, China pressed its AD claim 3 on the grounds, as stated in that claim:

(a) that Australia had failed to determine the second condition, or had wrongly determined that condition, in circumstances where it was necessary to properly determine whether the rule to base calculations of costs on an exporter's records applied, both absolutely (wind towers and stainless steel sinks) and before resorting to a consideration of whether there was any ability to derogate from that rule (railway wheels); and

(b) without detracting from that rebuttal, that Australia had wrongly interpreted any permitted derogation from the rule, on the "shall normally" basis, in the railway wheels case.

17. Turning first to Australia's claims that the second of the two conditions under Article 2.2.1.1 for calculating costs on the basis of their records was not satisfied with respect to the wind towers and stainless steel sinks exporters, China sees no evidence on the record of those investigations to support that claim. Australia did not determine or did not properly determine that the exporters' records reasonably reflected the costs associated with the production and sale of the product concerned. Appellate Body reports make clear that the second condition is satisfied where the recorded costs suitably and sufficiently reproduce the costs incurred by the exporter as have a genuine relationship with the production of the product concerned. *Ipso facto*, that condition is satisfied with respect to actual input costs if the records record those actual input costs. Australia's attempts to escape the confines of the second condition, in order to justify ignorance of those exporters' record costs, are unconvincing.

18. Turning now to the defence put up by Australia with respect to the rejection of the record costs of the railway wheels exporter (and of the stainless steel sinks exporters, in a later expiry review), Australia claims that it was released from compliance with Article 2.2.1.1's obligation to calculate costs on the basis of the exporters' records because that is only what "normally" applies. Australia argues that the "circumstances" in which those exporters' costs were formed were "not normal or ordinary". Australia also claims that the existence or non-existence of the rule constituted by application of the two conditions need not be examined before considering any flexibility to derogate from the rule that may be afforded by the "shall normally" wording. This is despite rulings and observations of previous panel and Appellate Body reports that state the contrary.

19. Regarding Australia's employment of the word "normally" to ignore the railway wheel exporter's actual verified costs, in records that Australia says it did not need to find satisfied the two conditions, China responds in the following manner.

(a) First, China notes that Australia did not adopt the required order of analysis of the rule and of any permitted derogation from the rule in the first sentence of Article 2.2.1.1. This is because Australia failed to determine the second condition before contemplating whether any derogation from the rule that is established by satisfaction of the two conditions may apply. This failure is admitted by Australia.

(b) Secondly, China maintains that satisfaction of the two conditions establishes the normal state in which an investigating authority must apply the cost calculations on the basis of the records kept by the exporter, and that "normally" does not provide an exception that is independent of satisfaction of the two conditions.

(c) Thirdly, having been invited by Panel questioning to consider whether there may be a second permissible interpretation of the first sentence of Article 2.2.1.1, China indicated its preference for the proposition that satisfaction of the two conditions effectuates the rule and excludes any derogation therefrom, as explained in (b) above. Without detracting from that preference, China considered that an independent "normally" derogation could be enlivened with respect to the manner of calculation of costs in an exporter's records, as an accounting matter, but that such a derogation could neither cause nor permit an exporters' *actual verified purchase costs* to be ignored.

(d) Fourthly, China submitted that it is not necessary for the Panel to determine the circumstances in which a departure from the calculations of costs in an exporter's record costs may be justified, under the assumption that the "shall normally" wording provides some "flexibility". In China's submission, any flexibility would only relate to cost calculation issues, in an accounting sense, and only in compelling circumstances, and would not extend to the exclusion of actual costs incurred by and recorded in an exporter's records.

20. China has supported its submissions in this regard with observations going to the ordinary meaning, context, object and purpose of Article 2.2.1.1. With respect to the second permissible interpretation, China also presented supplementary means of interpretation to assist the Panel. This has been done on the basis that any meaning purportedly allowing a WTO Member to form its own unbounded view of whether an exporter's actual costs are "normal or ordinary", as Australia would have it, would lead to manifestly absurd or unreasonable results.

21. Lastly, China notes Australia's claims that, in an expiry review with respect to stainless steel sinks, it did determine the two conditions, and found that they had been met, and then went on to determine that circumstances existed for a "normally" based avoidance of the rule requiring the acceptance of the exporters' records for cost calculation purposes. In response to those claims China has pointed out that no finding in the terms of the second condition is evident on the face of the expiry review report. Moreover, China notes Australia's admission that no negative finding with respect to "normally" appears in the record of that investigation. Regardless, China equally relies upon the interpretations of ADA Article 2.2.1.1 presented to the Panel in rebuttal of Australia's railway wheels "normally" defence with respect to Australia's claim to have made a negative "normally" determination in the stainless steel sinks expiry review.

A.4 AD claim 4
Australia used non-record costs of production in applying the ordinary course of trade test to stainless steel sink exporters

22. ADA Article 2.2.1 employs an exporter's cost of production plus a reasonable amount for administrative, selling and general costs in the application of the ordinary course of trade test, pursuant to which sales may be disregarded in determining normal value by reason of price.

23. The cost of production to be used in the below cost test under Article 2.2.1 must comply with the requirement to use the exporter's cost record under Article 2.2.1.1 and ultimately must be the cost in the country origin under Articles 2.1 and 2.2. The non-compliance adverted to by China in AD claim 3 also renders Australia's application of that test with respect to the stainless steel sinks exporters non-compliant with its obligations. This is because the cost of

production used in the application of that test was not the exporters' record costs, nor was it the cost in the country of origin.

24. Australia offers no substantive defence other than to reiterate its defence with respect to AD claim 3. As stated, Australia's claim that an exporter's *actual verified purchase costs* can be ignored, when it failed to determine or wrongly determined whether the second condition in the fourth sentence of Article 2.2.1.1 had been met, or based on an interpretation of "normally" that Australia related to the exporters' *actual verified costs* instead of to the *calculations of costs*, on the purported basis that the exporters' actual verified costs were formed in circumstances that were not "normal or ordinary", is unsustainable.

AD claim 5.c
Australia used a value not recognisable as a cost in working out the wind tower exporter's cost of production

25. ADA Articles 2.2 and 2.2.1.1 require an exporter's cost of production to be determined in the country of origin and to be based on its records. In each case the exporter's cost records must be properly examined.

26. China has drawn the Panel's attention to the fact that the Chinese wind tower exporter's plate steel and flange costs were "uplifted", in the original investigation, by a concoction of "domestic selling prices in other markets for plate steel", being those in Chinese Taipei and Korea, and the "normal value" of a Chinese steel plate producer in a different investigation. Then, in a later expiry review, the fabricated and inflated "competitive market cost" value for plate steel was further uplifted using the movement in SBB (data agency) plate steel "benchmark" prices for East Asia, excluding China, over the period from the original investigation to the time of the expiry review ("the SBB price trend").

27. These practices were a contrivance. They led to "cost" findings that had no factual, legal or logical basis at all. In its original investigation, Australia asserted that the difference between the so-called plate steel "domestic selling price in other markets" and the "normal value" of the same Chinese plate steel from an earlier time must be applied as an uplift ratio to the Chinese wind tower exporter's actual cost for plate steel to derive the "competitive market cost" for plate steel and flange in China. The Chinese exporter's costs for plate steel and flange were uplifted by a ratio that had no comparative correlation with those costs. The ratio was the difference between two values unrelated to the Chinese exporter's costs.

28. Then, in uplifting the SBB "benchmark" by the degree by which the imputed plate steel cost from the original investigation was higher than the SBB benchmark from the same time, a "super inflated" benchmark was created. This caused a further uplift to the Chinese exporter's cost of plate steel, which was already higher than the SBB benchmark before it was uplifted.

29. China's claim is that the "cost" thereby arrived at is not a cost of production of any description. There was no genuine determination of the suitability of the Chinese exporter's cost records as required by Article 2.2.1.1. The replaced cost was not a cost of production in the country of origin nor was it an exporter record cost. But more than that, it was incapable of answering the description of being a "cost", anywhere or at all for the purposes of Article 2.2's requirement that normal value may be determined using an exporter's "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".

30. Australia's argument that this claim is "subsumed" within China's claim 1 is incorrect. China's claim 5(c) is an extension of China's claims 1 and 3. China's claim 5.c highlights that costs must be used for working out the cost of production in the country of origin. The plate steel "number" or "value" Australia came up with was not recognisable as a cost at all.

A.6 AD claim 5.d
Australia used a type of cost that was not incurred by the railway wheel exporter in working out its cost of production

31. ADA Articles 2.2 and 2.2.1.1 require an exporter's cost of production to be determined in the country of origin and to be based on the calculations in its records. In each case costs must be identified.

32. This claim is similarly an extension of AD claims 1 and 3, but in a different sense. One of the costs used by Australia to work out the railway wheel exporter's cost of production in the country of origin was not a cost experienced by the exporter in undertaking such production. The exporter's costs were raw material input costs for steelmaking, including iron ore, coking coal and steel scrap, and the costs of conversion of these inputs into steel billet. Australia ignored those costs and instead worked out the exporter's cost of production using an intermediate product cost, that of steel billet. That it was improperly derived from a French purchase price, as to which see AD claims 1 and 3, is one thing. That it was not a cost of iron ore, coking coal or steel scrap, and of their conversion, which were the railway wheel exporter's actual costs, is another thing, and is the basis for this claim.

33. As for AD claim 5.c, Australia again argued that China's claim 5.d is subsumed into AD claims 1 and 3. It is not. To work out an exporter's cost of production in the country of origin, Australia was required to use the costs experienced by the exporter. Steel billet was not purchased by the railway wheel exporter. Should there be grounds to use a "cost of production … plus a reasonable amount for administrative, selling and general costs and for profits" as a proxy for a domestic selling price normal value, then China says that the types of costs used in that working out must be those of the cooperative exporter to which the cost of production is to apply.

A.7 AD claim 6.a
Australia made no due allowance for higher non-country of origin/non-record costs used for normal value compared to lower actual costs used for export price

34. ADA Article 2.4 requires a fair comparison to be made between the export price and the normal value, by way of due allowance. This extends to any differences that are demonstrated to affect price comparability.

35. As stated, due allowance must be made for differences affecting price comparability. In the cases at issue, the prices were the export price of the products concerned and their respective proxy price worked out using "cost of production … plus a reasonable amount for administrative, selling and general costs and for profits". Cost was a difference affecting that price comparability, because in each case the normal value incorporated higher costs than the export price. These higher costs are the subject of China's AD claims 1 through 4. *Ipso facto*, the cost difference must be a relevant candidate for due allowance.

36. Australia's argument in response is that Article 2.4 is concerned with differences that affect price comparability between the normal value and export price. Apart from making the unexplained assertion that Article 2.4 cannot undo adjustments in the construction of normal value properly made under other provisions of the covered agreement, Australia does not articulate why its argument does not support China's claim.

37. Australia and China have agreed that the Panel need not make a finding with respect to claim 6.a if it is the case that China's AD claims 1 through 4 are sustained.

A.8 AD claim 6.b.i
Australia applied an inflated upward due allowance to stainless steel sinks exporter's normal values based on a fictional non-refundable VAT cost

38. ADA Article 2.4 requires a fair comparison to be made between the export price and the normal value, by way of due allowance. The differences must be demonstrated to affect price comparability.

39. The first problem that China has with this adjustment is that it was made without reasoned and adequate explanation, and without positive evidence that could either establish or quantify the effect of the VAT liability differences that affected price comparability. This lack of positive evidence is plainly demonstrated on the face of the investigation record. The exporter concerned made a submission about the way the due allowance had been calculated. In response the investigating authority claimed that because the exporter was aware of the "fact" that it was unable to recover the full amount of VAT paid, this "should have" caused the exporter to raise its export price.

40. Australia argues that there was positive evidence underlying its finding that the VAT liability difference affected price comparability. However, all it refers to by way of evidence is the VAT liability difference itself. No information was sought from the exporter as to how or whether the actual non-refundable amount may have impacted the exporter's export pricing decision in comparison to its domestic pricing decision. China's position is that it is not open to an investigating authority to make an adverse price comparability finding where it has no evidentiary basis to do so.

41. The second problem that China has is that, even if the VAT liability differences did have an impact on price comparability, the adjustment calculated and adopted by Australia was not made based on that difference. The problem that China has with this is simply explained. The difference between VAT that was refundable on export sales of the products, being nine percentage points of the export price, as compared to the 17 percentage points of VAT collected on domestic sales, being eight percentage points, was applied to the normal value, whether that normal value was calculated on a VAT free domestic price basis, or on a VAT free cost-plus-profit basis. As such, the adjustment could not serve the purpose of adjusting for what Australia claims to be an additional cost arising from the non-refundable VAT expense on export sales. The adjustment so applied was not a due allowance based on the merits of the case.

42. Furthermore, the normal value was either constructed based on, or affected by the use of, non-actual, non-country of origin and non-record costs that were wrongly imputed to the respective exporters. The eight percentage point upwards adjustment operated on a non-actual cost base and also could not be representative of an actual cost difference. Making an adjustment to account for a non-actual amount could not have been an allowance made on its "merits".

43. Australia's defence to its non-actual due allowance approach extends to nothing more than a statement that the difference (between performing the due allowance correctly and doing it in the way it was) was not "material". Materiality is not to the point, but even if it was relevant the record demonstrates that the non-evidenced and non-actual adjustment made equated to an 8.7% upward adjustment to the normal value, which is clearly "material".

A.9 AD claim 6.b.ii, first instance
Australia applied an inflated upward due allowance to stainless steel sinks exporters' normal values by differentiating between profit on self-produced and purchased accessories

44. ADA Article 2.4 requires a fair comparison to be made between the export price and the normal value, by way of due allowance. The differences must be demonstrated to affect price comparability.

45. China's claim is that it was improper for Australia to ascribe a profit to an "accessory" cost difference in stainless steel sinks sold domestically as compared to those exported, based on whether the accessory was self-manufactured by the exporter instead of being an accessory purchased by the exporter.

46. Australia admitted in its investigation report that where the cost adjustments for specification differences occurred with respect to accessories purchased from third party suppliers, no "ordinary course of trade" profit margin would be applied. This is despite the fact that the Chinese exporter confirmed that it did not treat self-produced accessories differently to procured accessories for the purpose of determining the cost and price of the stainless steel

sinks as a final product. Accessories were accounted for no differently than other material inputs. The exporter therefore did not discriminate the profit earnings associated with accessories based on their source and was incapable of doing so.

47. Australia has tried to hide its discriminatory approach towards adjusting for specification differences by stating that it was a merits determination, whereby it was concluded that certain accessories were priced inclusive of profit, whereas others were not. In response China draws attention to the fact that profit is earned on all costs incurred in the production and sale of any given product. Profit is the difference between revenue and cost, whatever those costs are. Australia's argument has no factual, financial, accounting or mathematical logic to support it.

A.10 AD claim 6.b.ii, second instance
Australia applied an inflated upward due allowance to stainless steel sinks exporters' normal values using average specification costs not applicable to the compared models

48. ADA Article 2.4 requires a fair comparison to be made between the export price and the normal value, by way of due allowance. The differences must be demonstrated to affect price comparability.

49. China's claim is that Australia made a due allowance that was not precise enough to properly adjust for the actual differences between the domestic and export models of certain stainless steel sinks. Put simply, certain product models in a given "model control code" (a grouping of product models, known by the acronym "MCC") were disqualified from normal value usage by application of the "ordinary course of trade" below cost test performed on a MCC basis. The dumping margin was calculated using the remaining product models in the MCC. However, the due allowance as between the domestically sold and exported product models that remained was worked out as an average of the specification cost difference across the entire MCC, and not for the remaining product models alone.

50. China has referred the Panel to WTO authority that makes clear that complexity is not an excuse for failing to undertake adjustments that are necessary to ensure the correct determination of dumping margins. This is consistent with the plain wording of Article 2.4, which provides that due allowances must be made in each case, on the merits.

51. Australia's various rebuttals – that the adjustments made were "appropriate" and "recognised difference", that averaging carries with it "inherent distortions", and that adjustments were made "to the extent" required to ensure a fair comparison – are a smokescreen. They betray the fact that Australia's finding suffers from a substantial and critical lack of required accuracy, as China has demonstrated to the Panel factually and legally.

A.11 AD claim 6.b.iii
Australia made a due allowance for specification difference based on a comparison between export model costs instead of between an export model and a domestic model

52. ADA Article 2.4 requires a fair comparison to be made between the export price and the normal value, by way of due allowance. The differences must be demonstrated to affect price comparability.

53. Australia used a cost of production difference between two export models for the purposes of working out the impact of a specification difference on a dumping margin. China's concern is to understand why the specification difference was worked out between two export models, when it should have been worked out on the basis of the specification cost difference between the two models being compared for dumping margin purposes, being a domestic model and an export model.

54. Australia admitted, on the record, that the specification difference was worked out comparing the cost of production of two export models, even though it was open to Australia to use domestic costs. Domestic costs "could" have been used but, according to Australia, using the

export costs "in a way" achieved that outcome. China disagrees. It cannot be possible to demonstrate the effect on the price comparability of an export product and a domestic product if circumstances affecting two export products are the circumstances considered.

A.12 AD claim 7.a
Australia failed to work out amounts for profits on the basis of actual data pertaining to production and sales of the wind towers and stainless steel sinks exporters

55. ADA Article 2.2.2 requires amounts for profits to be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.

56. China's AD claim 7.a identifies the clear fact that, with respect to the amount for profits for determining the normal value of wind towers, Australia worked out a rate of profit based on the exporter's actual costs compared with its actual revenue. That rate was then applied to the sum of the inflated costs of production, being the cost of production adopting non-country of origin non-record costs (AD claims 1 and 3, respectively) and non-costs (AD claim 5.c), and the selling general and administrative costs. The amount for profits was therefore not based on actual data, because it was based on non-actual costs, being data that was not the actual data pertaining to production of the like product by the exporter.

57. With respect to stainless steel sinks, China's AD claim 7.a identifies the clear fact that Australia used non-actual costs in the ordinary course of trade test for one exporter where comparable domestic sales were found to exist. The implication here is that the higher than actual non-country of origin non-record costs (AD claims 1, 2, 3 and 4, variously) caused only the higher priced domestic sales to remain in the universe of domestic sales used for normal value purposes. For the one exporter that was found to have comparable domestic sales, this also caused the profit on the sales that did pass the ordinary course of trade test to be higher than it otherwise would have been. That rate of profit was applied to the higher than actual non-country of origin non-record costs (AD claims 1, 2, 3 and 4, variously) for models of stainless steel sinks that did not have comparable domestic sales.

58. For the other stainless steel exporters, Australia found no comparable models for determining a dumping margin at all. Nonetheless, an ordinary course of trade profit was worked out for the entire universe of domestically sold stainless steel sinks, using the higher than actual non-country of origin non-record costs (AD claims 1, 2, 3 and 4, variously) in doing so. It was this distorted profit – distorted because it only included the higher priced domestic sales that survived application of the ordinary course of trade test – that was the applied to the cost of production plus a reasonable amount for administrative, selling and general costs. However, it was not the cost of production in the country of origin of the exporters concerned, because of the inclusion of non-country of origin non-record costs. That is, the amount for profit was not calculated based on actual cost data pertaining to production of like products by the exporter under investigation.

59. Australia attempts to convince the Panel that because Article 2.2.2 *chapeau* provides that amounts for profits shall be based on the exporter's actual data, it does not matter if the basis includes non-actual data or changes due to the introduction of non-actual data. This is a vacant argument. The only other argument that Australia puts up is that the *chapeau* has not been interpreted in previous WTO cases, to which China responds by saying that is probably because no right-minded Member would conceive of applying it in a manner that is contrary to the plain words of the Article.

A.13 AD claim 7.b
Australia failed to work out the actual amounts incurred and realised by the railway wheels exporter in respect of production and sales in the domestic market of the country of origin

60. If actual data pertaining to production and sales in the ordinary course of trade of the like product does not allow for profit determination, ADA Article 2.2.2(i) allows amounts for profits to be determined in respect of the actual amounts incurred and realised by the exporter in

respect of production and sales in the domestic market of the country of origin of the same general category of products.

61. China's AD claim 7.b identifies that Australia did not separate domestic cost and sales data from export cost and sales data in its application of Article 2.2.2(i) when working out a profit rate of the same general category of products in the railway wheels case. That rate was then applied to the sum of the inflated costs of production, being the cost of production adopting non-country of origin non-record costs (AD claims 1 and 3, respectively) and non-costs (AD claim 5.c), and the selling, general and administrative costs. The amount for profits was therefore not based on the actual amount realised by the exporter, because the amount was based on non-actual costs, and not only with respect to sales in the domestic market.

62. Australia's defences are various and unusual. First, Australia says that it was not possible for its investigating authority to disaggregate the data concerned. Second, Australia says that the record of the investigation does not show whether it was possible for the exporter to do so. Lastly, Australia says that its investigation authority followed the exporter's request to do it wrongly. China submits that none of these claimed defences absolve Australia from properly carrying out its investigation and complying with its obligations under Article 2.2.2(i).

63. Ultimately, therefore, Australia cannot deny, and it must be accepted, that the amount for profit was not the actual amount realised by the Chinese exporter on its domestic sales, and that the determination failed to comply with Article 2.2.2(i).

A.14 AD claim 7.c
Australia arrived at opposite "like products" findings in the same investigation, such that one or the other of those findings was wrong

64. ADA Article 2.2 provides that a comparable price of a like product can be determined, as the normal value of the like product to that exported, using third country export price or cost of production plus administrative selling and general costs and profits, if domestic sales are not available for that purpose. There are three reasons that domestic sales may not be available. They are no sales of the like product in the ordinary course of trade in the domestic market; a particular market situation in the domestic market; or a low volume of sales in the domestic market.

65. ADA Article 2.2.2 provides a means for working out the amounts for profits where there are sales in the ordinary course of trade of the like product in the domestic market.

66. China's AD claim 7.c draws attention to Australia's usage of a costs and profit construction as the comparable price, on the basis that there *were no domestic sales* of the like product for normal value purposes, which was opposed to its usage of the ordinary course of trade profit calculation on the basis that there *were domestic sales* of the like product in the domestic market. Both cannot be correct. There are either sales of the like product in the domestic market, or there are not.

67. Australia attempts to answer this by saying that it did not find that there were no domestic sales of like products for the purposes of Article 2.2. Rather, it says there were no relevant sales of like products. It does so without explaining, on the investigation record or in the proceedings, which of the three grounds for diverting from domestic sales of like products gives credence to this relevancy argument.

A.15 AD claim 8
Australia imposed amounts of anti-dumping duties that exceeded and were greater in amount than the margin of dumping

68. GATT 1994 Article VI:2 allows a contracting party, in order to offset or prevent dumping, to levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. ADA Article 9.3 requires that the amount of any anti-dumping duty shall not exceed the margin of dumping as established under ADA Article 2.

69. China laid out all of its AD claims in detail. Each claim addressed a circumstance that caused the normal value to be higher than it otherwise would have been.

70. Australia's defence is that China's AD claim 8 is entirely contingent on the Panel finding that Australia acted inconsistently with ADA Article 2 under China's individually enumerated and explained claims. Australia states that China has not made out a *prima facie* case with respect to any of China's claims. Australia therefore does not contest, with respect to China's claims with which the Panel agrees, that Australia imposed amounts of anti-dumping duties that exceeded and were greater in amount than the margin of dumping that should have been established.

71. In that circumstance China's AD claim 8 is uncontested. Therefore, the success of China's AD claim 8 will follow the outcome of the Panel's findings with respect to China's other AD claims.

B China's CV claims

B.1 CV claims 2 and 3
Australia failed to determine or improperly determined that the alleged provision of goods conferred a benefit to the recipient and wrongly determined that the alleged provision of goods was made for less than adequate remuneration

72. SCMA Article 1.1(b) requires that for a subsidy to exist, it must confer a benefit. Australia considered that an alleged provision of goods, being the form of subsidy described by SCMA Article 1.1(a)(1)(iii), had benefitted Chinese stainless steel exporters ("Program 1"). Determining whether a benefit is conferred via such a subsidy requires the application of the disciplines outlined in SCMA Article 14(d). Accordingly, there will be no conferral of benefit unless the provision of goods is made for less than adequate remuneration. Article 14(d) requires that such a determination must be made in relation to the prevailing market conditions for the goods in question in the country of provision or purchase.

73. The determination of the adequacy of remuneration requires a comparison between the cost of provision of the allegedly subsidised goods and a benefit benchmark. Normally a benefit benchmark will be based on prices derived from the market for the goods in question. This is because such prices have the requisite connection with the prevailing market conditions in the country of provision or purchase, and so align with the requirements of Article 14(d).

74. There is an exception to this general rule, arising in circumstances in which there is a price distortion arising from government intervention in the market in which the goods are provided, such that private prices arising from that same market cannot be said to be market determined. That exception is limited. The existence of such a price distortion does not hinge on government intervention, even where such intervention is considered to be widespread. What is required is an analysis of the specific market in question which establishes a nexus between the identified government intervention in that market and price distortion. Where such a nexus is indirect, a more detailed analysis will be required.

75. In the original stainless steel sinks investigation, and since then, Australia has relied upon out of country prices to determine the benefit conferred by Program 1.

76. Australia argues that because the Chinese Government did not provide a complete response to the Government Questionnaire, it was appropriate to rely on findings in prior investigations relating to different products to conclude that there was a price distortion in the Chinese market for 304 SS CRC, which would render in-country prices derived from that market inappropriate for the task set by Article 14(d).

77. This is not a sufficient basis to disregard private, in-country prices. The analysis required to establish the existence of a price distortion in the market for the supposedly subsidised goods must consider that market. Australia has not identified any analysis of the market for 304 SS CRC. Australia did not identify, in the record of its investigation, any specific government intervention in the Chinese market for 304 SS CRC. Australia did not identify or explain any nexus between such intervention and the alleged distortion. In total, the record relating to

Program 1 was ignorant of the conditions in the market for the good that Program 1 allegedly provided.

78. There was no reasoned or adequate explanation justifying the adoption of an out-of-country benefit benchmark to determine the conferral of any benefit under Program 1. Yet, in all but one instance, the benefit benchmark used with respect to Program 1 was based on out-of-country prices. In each of these instances, the out-of-country prices were adjusted to reflect only the differences in delivery terms between the Chinese market and the markets from which the benchmark was drawn.

79. To reiterate, SCMA Article 14(d) dictates that the determination of the adequacy of remuneration must be made in relation to the prevailing market conditions of the goods in question. This requirement applies whether or not the benefit benchmark is derived from in-country prices or, where reasoned and adequately explained, out-of-country prices. In the latter case, this may require adjustments to the out-of-country prices, so that they relate to, or refer to, or are connected with, prevailing market conditions for the goods in question.

80. Australia argues that it considered making adjustments to the benchmark, and so it took all necessary steps to select a benchmark that reflected prevailing market conditions.

81. A finding that goods were provided for less than adequate remuneration needs to be determined in relation to prevailing market conditions for the good in the country of provision or purchase. The benchmarks used to determine the adequacy of remuneration for Program 1 were an amalgam of North American and European price benchmarks, adjusted only for differences in delivery costs between those markets and China. A benchmark derived in that way does not reflect the prevailing market conditions in China. This remains the case irrespective of whether the investigating authority considered making other adjustments. The requirements of Article 14(d) need to be met to determine that any provision of goods was at less than adequate remuneration.

82. Australia's determination that 304 SS CRC was provided for less than adequate remuneration does not meet the requirements of Article 14(d). Australia rejected in-country prices without any reasoned or adequate explanation as to why the market in which those prices were derived was distorted, Australia then adopted a benchmark that did not relate to the prevailing market conditions in the Chinese marker for 304 SS CRC. It follows that the conclusion that Program 1 conferred any benefit under Article 1.1(b) was arrived at incorrectly.

B.2 CV claim 4
Australia failed to make a proper determination that the alleged provision of goods was specific

83. Article 2.1(c) requires any alleged *de facto* specificity of a subsidy to be ascertained against four criteria. The criterion relevant to this proceeding was "the use of a subsidy program by a limited number of certain enterprises". In determining that a subsidy is specific on such a basis, Article 2.1(c) requires that an investigating authority take account of both the extent of diversification of economic activities within the authority of the granting jurisdiction and the length of time in which the subsidy programme has been in operation.

84. Australia did not determine the existence of a subsidy program, in the sense that there is no record analysis of whether there was a systematic series of actions pursuant to which financial contributions which confer a benefit are provided to certain enterprises. Australia merely treated the concept of a subsidy and a subsidy program as interchangeable.

85. In this proceeding, Australia has attempted to adduce evidence, in the form of a list of transactions, upon which the existence of a subsidy program could be implied. In doing so, Australia has failed to reckon with prior panel and Appellate Body rulings that such a list, or such transactions, is or are alone insufficient to establish a systemic series of actions that would constitute a subsidy program. Australia has also not recognised explicit statements in panel and Appellate Body reports that require an investigating authority to provide a reasoned and adequate explanation as to how the evidence indicates the existence of a subsidy program. This was not done by Australia.

86. With respect to the requirement that an investigating authority must consider the length of time in which the subsidy program has been in operation, Australia has only pointed to an indeterminate reference to the duration of supposed government influence. Australia did not identify the length of time the alleged subsidy program was in operation, nor did Australia consider whether that period of operation had explanatory force behind the supposed use of the program by a limited number of certain enterprises.

87. Similarly, with respect to the extent of diversification of economic activities within the authority of the granting jurisdiction, Australia has merely pointed to its conclusion that Program 1 is specific. There is no active or meaningful consideration of this factor.

88. Article 2.1(c) is said to set out the terrain for assessing *de facto* specificity. Australia's conclusion that Program 1 was specific was not made within the bounds of this terrain, and so does not comply with Australia's obligations under Article 2.1(c).

B.3 CV claim 5
Australia initiated the countervailing investigation without sufficient evidence and without proper review of the evidence

89. SCMA Article 11.3 sets out the circumstances in which a subsidy investigation can be initiated. It requires that the investigating authority review the accuracy and adequacy of the evidence provided in an application lodged in accordance with Article 11.2 to determine whether the evidence is sufficient to justify the initiation of an investigation. This includes evidence of the existence of a subsidy, as well as evidence of the nature (i.e., specificity) of the alleged subsidy. By its terms, simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of Article 11.2.

90. The application lodged by the Australian industry did not include evidence of the specificity of Program 1. The application does not use the term "specificity". Any "specificity" of Program 1 is not referred to in the consideration report which set out the investigating authority's review of the evidence upon which the initiation of the investigation was based. Australia has referred to comments in the application to suggest that the specificity of Program 1 was implied in the allegations. This is tenuous. Any such implication would only amount to a faint assertion, and not evidence.

91. Australia's further argues that an investigation authority has free rein to examine information outside an application where evidence is not reasonably available to the applicant. China accepts that an investigating authority may have regard to information outside an application, to review the accuracy and adequacy of information included in the application for the purposes of Article 11.3. China does not accept that there is a broad discretion to find additional information to redress fundamental evidentiary flaws in an application.

92. Further, China disagrees that, at the time of initiation of the investigation, Australia's investigating authority had regard to information outside the application to satisfy itself that there was sufficient evidence of specificity to justify that initiation. The contemporary record does not evidence any such consideration. Indeed, it does not concern itself with the specificity of Program 1 at all.

93. In these proceedings, Australia has argued that the investigating authority had regard to prior investigations in relation to different products. But this logic is flawed. The outcomes of these prior investigations were publicly available, and so "reasonably available" to the applicant, thus undercutting the supposed justification for the investigating authority looking outside the application. Confronted with this, Australia then referred to confidential attachments to those investigations that China has not seen and that were not provided to the Panel. In any case, these prior investigations did not consider whether the provision of 304 SS CRC was specific to certain enterprises.

94. The application did not meet the requirements of Article 11.2, meaning that the initiation of the investigation was not justified under Article 11.3.

C Australia's "terms of reference" objections

95. Australia has sought to strike out many of China's claims on the basis that the panel purportedly lacks jurisdiction to hear those claims. These have become known in the proceedings as terms of reference ("ToR") issues. Australia's arguments may be separated into two categories. The first is Australia's argument that measures that are the subject of China's claims "no longer exist". The second is that China's request for the establishment of a panel ("RFE", "panel request") did not sufficiently bring some of China's AD claims or any of China's CV claims before the Panel in terms of DSU Article 6.2.

96. These arguments are without merit. They only reflect Australia's desperation to avoid being brought to account for its longstanding and wide-ranging mistreatment of China and Chinese exporters in AD and CV matters.

C.1 ToR, first category
Australia's argument that the panel lacks jurisdiction because challenged measures no longer "exist" is without merit

97. China has demonstrated to the Panel that Australia's preliminary ruling request for the Panel to agree that certain of the measures at issue "no longer exist" fails, for many reasons. China has responded by pointing out:

    (a) that the measures have not expired;

    (b) that the original investigations form the continued legal and practical foundation for the measures;

    (c) that the measures at issue present relevant and current WTO violations;

    (d) that the measures are a connected, continuous set of measures with continued legal, practical and operational effect; and

    (e) that the dispute between the parties remains unresolved and is amenable to resolution via findings and recommendations of a panel.

98. Australia argues that all of China's wind tower AD claims are outside the panel's jurisdiction based on two allegations. The first is that the original investigation had ceased to provide the legal basis for the anti-dumping duties when the Panel was established. The second is that the express revocation of the AD order with respect to the only cooperative exporter at the time of the original investigation, TSP, in some manner "expired" the measures about which China has complained.

99. Australia's first argument fails because of the foundational nature of the original investigation and the legal continuation of the AD order thereafter. Australia's second argument fails both on the same reasoning and because the measures were imposed against all other Chinese wind tower exporters on the basis of the reasoning and findings of the investigating authority in the originating proceeding. Of course, the challenged AD order continues to exist. The basis of China's AD claims is how the order came to be in existence in the first place, and how it has been further developed in other non-compliant ways since then.

100. Australia further argues that China's stainless steel sinks AD claims relating to the findings made in the original investigation are outside the panel's jurisdiction, on the alleged basis that the original investigation had ceased to provide the legal basis for the anti-dumping duties when the Panel was established. China responds to this in the same way as it has responded to the same allegation made by Australia with respect to the wind tower AD claims.

101. A principal "measure" that Australia claims no longer exists is the measure that includes the finding, and the reasoning underlying the finding, concerning the alleged Article 1.1(a)(1)(iii) provision of goods at less than adequate remuneration subsidy for Chinese stainless steel exporters ("Program 1"). Australia claims that the Australian measure with respect to that alleged subsidy no longer existed at the time of the RFE. However, that is not the case at all.

(a) First, the countervailing measure was put in place based on Australia's conclusion that there were a number of countervailable subsidies, including Program 1. A later conclusion at the time of what is referred to under Australian law as a continuation inquiry, which determines that at the time of the continuation of the original measure there was no amount of Program 1 subsidy, does not reverse the non-compliance on which the imposition of the measure was originally based.

(b) Second, China has provided evidence that demonstrates that in Australia's domestic system there is a legal assumption that the foundational subsidies found in an original proceeding continue to be open to investigation during reviews and are open to be re-countervailed if is found that amounts of those subsidies have been received in the period of the review, even where the subsidies were not countervailed in a previous period.

(c) Third, under Australian law there is no legal power, at the time of continuation of a measure, for the competent Minister to do anything other than revoke the whole measure or, if not revoked, to remove one or other of the exporters or countries subject to the continued measure from its scope and/or to remove certain kinds of products from amongst the like products that are subject to its scope. It is not possible for the operative order to be no longer applicable to a particular alleged subsidy unless it is expressly and fully revoked.

(d) Lastly, in none of the reviews subsequent to the original imposition of the measures is there any recanting or reversal of the unsound reasoning upon which the imposition of the measure with respect to the Program 1 subsidy was first justified.

102. China has also noted that even where measures are truly "expired", which has in any case not been established, a panel can still make findings and recommendations with respect to them.

C.2 ToR, second category
Australia's assertion that not mentioning specific ADA and SCMA Articles compromises China's RFE is incorrect

103. Australia argues that without citing ADA Articles 11.3 and 11.2, all of China's AD claims with respect to matters arising from review and expiry review determinations concerning wind towers and stainless steel sinks are outside the Panel's jurisdiction. This argument firstly rests on the proposition that subsequent review determinations become the exclusive basis of measures that are continued (not expired). Such a proposition is incorrect, semantically, procedurally and legally, as China has already exposed with respect to Australia's first category of ToR complaints.

104. Secondly, China notes that it has not made a claim that requires adjudication of any element of Article 11.3 or Article 11.2. China's AD claims are brought in relation to Australia's failure to act consistently with the requirements set out in ADA Articles 2.1, 2.2, 2.2.1, 2.2.1.1, and 2.4, and GATT 1994 Article VI:1 (and, as a result, ADA Article 9.3 and GATT 1994 Article VI:2). ADA Article 2 expressly applies in relation to the determination of dumping "for the purposes of the Anti-Dumping Agreement". The procedures within which those non-compliances occurred are defined and covered by the instruments clearly identified in the RFE. Thus, China maintains that mention of ADA Articles 11.3 or 11.2 was not called for and that its RFE presented the legal problem sufficiently clearly.

105. China rebuts Australia's identical argument as posited with respect to China's CV claims concerning stainless steel sinks – which is that SCMA Article 21.3 was not cited in the RFE – in identical manner.

106. Australia's final ToR argument is that not citing SCMA Article 2.4 is fatal to the adjudication of China's CV claim. China responds by noting that Australia pays no heed to the totality of the RFE and what can be specifically inferred from its text. A reasonable panel, assessing China's RFE on its merits, as a whole, and in light of attendant circumstances, could not fail to recognise the narrative statement therein that Australia "did not clearly substantiate its determination on the basis of positive evidence". Nor, China suggests, could Australia. This

wording tracks and identifies SCMA Article 2.4's explicit direction that any determination of specificity shall be "clearly substantiated on the basis of positive evidence". Therefore, China's RFE provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly in this respect, consistent with the requirement of DSU Article 6.2.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. China's claims in this dispute relate to three separate steel products – railway wheels, wind towers and stainless steel sinks. Each of these products was the subject of separate and distinct investigations undertaken at different times over nearly a decade: three separate anti-dumping investigations for railway wheels, wind towers, and stainless steel sinks; plus a stainless steel sinks countervailing duty investigation; followed by three separate interim reviews for stainless steel sinks; and separate expiry reviews for stainless steel sinks and wind towers. The evidence shows that the ADC acted as an unbiased and objective investigating authority; that it carefully examined the different evidence before it in each investigation and that it made distinctly different findings based on the evidence.

2. China's case is fully without merit. It has either failed to establish a *prima facie case* or failed to demonstrate that the ADC's conduct and decisions were inconsistent with Australia's WTO obligations.

3. Most of China's claims are directed at matters outside the Panel's terms of reference. China's claims in relation to stainless steel sinks and wind towers are almost entirely directed at measures that have been terminated or superseded before the time of panel establishment. Those original determinations, and interim reviews, were terminated or superseded at the time of panel establishment and are outside the Panel's terms of reference under Articles 3.2, 3.4, 3.7, 6.2, and 7.1 of the DSU. The Panel, therefore, should not make findings or recommendations with respect to these claims under Article 19.1 of the DSU.

4. Moreover, in its panel request, China also failed to cite a legal basis capable of supporting its claims against the interim and expiry reviews, a minimum prerequisite that is always necessary under WTO rules. As a consequence, none of China's claims in relation to stainless steel sinks and wind towers are properly before the Panel. In any event, even if the Panel were to find that these claims are within its terms of reference, those claims lack merit.

5. China's claims that are properly before the Panel are those that concern the railway wheels investigation. These claims are based on a misunderstanding of Australia's domestic framework and on legally unsound interpretations of the Anti-Dumping Agreement.

6. Contrary to China's submissions, an unbiased and objective investigating authority could have reached the same conclusions as the ADC in each of the challenged investigations. The ADC's conduct and decisions were consistent with Australia's WTO obligations. Australia therefore requests that, to the extent the Panel finds China's claims within its terms of reference, the Panel rejects all of China's claims.

II. BURDEN OF PROOF

7. The burden of proof in WTO dispute settlement is on the complainant to establish a *prima facie* case of a violation of a covered agreement.[1] In presenting a *prima facie* case, the complainant must put forward evidence and legal argument in relation to each element of its claims.[2] It follows that a respondent's measure is to be "treated as WTO-consistent, until sufficient evidence is presented to prove the contrary."[3] Where argument or evidence is presented by a complainant, the evidence must

[1] Australia's first written submission, para. 9 citing Appellate Body Reports, *US – Carbon Steel,* para. 157; *EC – Tariff Preferences,* para. 105; Australia's first written submission, para. 10.

[2] Australia's first written submission, para. 9. Appellate Body Report, *US – Gambling*, para. 140. See also Appellate Body Report, *US – Zeroing (EC),* para. 217.

[3] Australia's first written submission, paras. 9–10; Australia's responses to Panel question no. 107, para. 236. Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66 (emphasis original). See also Appellate Body Report, *US – Carbon Steel,* para. 157.

be "sufficient to raise a presumption that what is claimed is true".[4] A mere assertion of a claim is not enough.[5]

8. China has largely failed in its burden as the complainant to make a *prima facie* case.[6] This includes with respect to several claims made by China towards Stainless Steel Sinks Interim Reviews 352, 459, 461, Expiry Review 517 and Expiry Review 487, in respect of which China presented no arguments or evidence.[7]

III. STANDARD OF REVIEW

9. The Panel's standard of review is established in Article 11 of the DSU and Articles 17.5 and 17.6 of the Anti-Dumping Agreement. In sum, this standard is whether an unbiased and objective investigating authority, in light of the evidence that was before it and the explanations provided, *could* have (not that it inevitably *would* have) reached the same conclusions as the ADC.[8] Under Article 17.6(i) of the Anti-Dumping Agreement, if the establishment of the facts by the investigating authority was proper and the evaluation was unbiased and objective, a panel should not overturn that evaluation, even though the panel might have reached a different conclusion.

10. Further, under Article 17.6(ii) of the Anti-Dumping Agreement, where there is more than one permissible interpretation of a provision, a panel should find the authority's measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[9]

IV. CHINA'S CLAIMS CONCERNING STAINLESS STEEL SINKS AND WIND TOWERS MEASURES ARE OUTSIDE THE PANEL'S TERMS OF REFERENCE

A. ALL OF CHINA'S CVD CLAIMS ARE OUTSIDE THE SCOPE OF THE PANEL'S TERMS OF REFERENCE

11. China's CVD claims in section B.2 of its panel request are directed only to the countervailing measures associated with Program 1. China expressly and unambiguously limited its claims to "the countervailing measures… only with regard" to Program 1.[10] All countervailing measures related to Program 1 have long been terminated at the time of panel establishment.[11]

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[4] Australia's first written submission, para. 10.

[5] Australia's first written submission, para. 10.

[6] See, e.g., Australia's comments on China's response to Panel question no. 95, paras. 87-96.

[7] See, e.g., Australia's comments on China's response to Panel question no. 95, paras. 87-96. China has failed to make a *prima facie* case with respect to a number of claims directed at the interim and expiry reviews by failing present any argument or evidence as to how that claim applies to the interim or expiry review, independent from the original investigation. See Australia's comments on China's response to Panel question no. 95, para. 87.

[8] See, e.g., Australia's first written submission, para. 12; Australia's second written submission, paras. 8-9. Panel Report, *US – Softwood Lumber VI,* para. 7.15. The standard of review under Article 11 of the DSU is understood in light of the obligations of the particular covered agreement to derive a more specific standard of review. In this way the standard of review under Article 11 moulds to the relevant covered agreement. See Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184 (referring to Appellate Body Reports, *US – Lamb*, para. 105 and *US – Cotton Yarn*, paras. 75-78). For Article 17.6(i), the Appellate Body has recognised the parallels with the Panel's role under Article 11 of the DSU. See Appellate Body Report, *US – Hot-Rolled Steel,* para. 55. While Article 11 of the DSU provides the standard of review for claims under the SCM Agreement, this standard also corresponds with claims under the Anti-Dumping Agreement.

[9] Australia's first written submission, fn. 11:

> In considering their standard of review, the arbitrators in *Colombia – Frozen Fries* found that, "… different treaty interpreters applying the same tools of the Vienna Convention may, in good faith and with solid arguments in support, reach different conclusions on the "correct" interpretation of a treaty provision. This may be particularly true for the Anti-Dumping Agreement, which was drafted with the understanding that investigating authorities employ different methodologies and approaches. Treaty interpretation is not an exact science and applying the Vienna Convention's method does not magically and inevitably lead to a single result. In most cases, treaty interpretation involves weighing, balancing, and choice" (fns. omitted). [Award of the Arbitrator, *Colombia – Frozen Fries,* para. 4.14].

[10] China's panel request, section B.2.

[11] PRR paras. 13, 23 and 25; Australia's second written submission, para. 25.

12. With very limited exception, measures that are no longer in existence before panel establishment are outside the panel's terms of reference.[12] The DSU does not vest panels with the authority to issue advisory opinions on measures that are expired, terminated, superseded or otherwise non-existent.[13]

13. At the time that China filed its panel request, no measure related to Program 1 had been in existence for nearly two years.[14] This is because in Expiry Review 517, which superseded the original determination in 2020, the ADC found that no exporter received a benefit in respect of Program 1. As a consequence, there was no subsidy and, in turn, no countervailing duties relating to Program 1 have been applied to any imports of stainless steel sinks from China since 27 March 2020.[15]

14. All of China's claims in sections B.2.1 through B.2.5 of its panel request are thus with respect to measures that were not in existence at the time the Panel was established. Accordingly, consistent with Articles 3.2, 3.4, 3.7, 6.2, 7.1 and 19.1 of the DSU and previous panel and Appellate Body reports, China's CVD claims are outside the Panel's terms of reference and the Panel should issue no findings or recommendations in respect of these claims.[16]

15. China has advanced several arguments seeking to remedy this defect in its panel request. For the reasons explained below, these arguments are without merit and should be rejected.

1. China improperly attempts to redefine the challenged measures contained in its own panel request

16. Under WTO rules, the measures at issue are those identified by a complainant in its request for panel establishment. Yet, despite the text of its own panel request, China has repeatedly attempted to recast the challenged measures throughout this dispute.[17]

17. At the first Panel meeting, China advanced an argument that the measures at issue were not just those "only with regard to Program 1", as expressly identified in its panel request, but, rather, "only one indivisible, continuous measure in each respect", including all instruments listed in no. 8 through 23 of the panel request's appendix.[18]

18. A complainant bears the burden of establishing that separate legal instruments comprise part of an overarching measure.[19] The complainant must provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components.[20] China has presented no evidence for why these separate legal instruments should be considered together, or how a countervailing measure taken as a whole is distinct from its parts.[21]

2. China's attempts to reinvent its claims in section B.2 of its panel request should be rejected

19. China has repeatedly attempted to reinvent its claims under section B.2 of its panel request and to drastically expand the scope of this dispute by advancing two principal arguments: (a) that its claims are with respect to the *methodology* used by the ADC to assess Program 1;[22] and (b) that it should be granted assurances that Program 1 would never be considered by the ADC in future

[12] Australia's first written submission, paras. 64-73. Appellate Body Report, *EC – Chicken Cuts*, para. 156: "[t]he term "specific measures at issue in Article 6.2 suggests that as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel".

[13] PRR, paras. 4-12; Australia's second written submission, paras. 68-72.

[14] Australia's second written submission, para. 25 citing fn 13: "It is clear, based on a plain reading of China's panel request, that the countervailing measures challenged by China are only those related to Program 1, namely the original determination and any resulting duties"; Australia's response to Panel question no. 7, paras. 9-14.

[15] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83, 85; *Evidence of Termination of Program 1*, (Exhibit AUS-71).

[16] Australia's second written submission, para. 25.

[17] Australia's second written submission, paras. 122-135.

[18] China's opening statement at the first Panel meeting, paras. 12-14.

[19] Australia's second written submission, para. 35 citing Appellate Body Report, *Russia – Railway Equipment*, para. 5.239.

[20] Australia's second written submission, para. 35 citing Appellate Body Report, *Argentina – Import Measures*, para. 5.108.

[21] Australia's second written submission para. 35.

[22] China's second written submission, paras. 39-40.

reviews.[23] Both of these arguments should be rejected. The first argument amounts to an impermissible attempt to convert China's "as applied" claims in sections B.2.1-B.2.5 to "as such" challenges. The second equates to an impermissible request for an advisory opinion from the Panel with respect to future, speculative measures.[24]

3. China's assertions that countervailing measures related to Program 1 still exist are baseless

20. China has asserted that countervailing measures related to Program 1 still exist.[25] China's assertions are simply wrong. Australia's evidence establishes that no countervailing measures related to Program 1 have existed since 27 March 2020.[26]

B. ALL OF CHINA'S AD CLAIMS WITH REGARD TO STAINLESS STEEL SINKS AND WIND TOWERS ARE OUTSIDE THE SCOPE OF THE PANEL'S TERMS OF REFERENCE

21. China's AD claims concerning both stainless steel sinks and wind towers investigations in section B.1 of its panel request are outside the Panel's terms of reference.

22. First, nearly all of China's claims concerning wind towers and stainless steel sinks in section B.1.1 through B.1.8 relate exclusively to the original determinations in both investigations. As the original determinations for stainless steel sinks and wind towers were superseded by expiry reviews at the time of panel establishment, they are not "measures at issue" for the purposes of Article 6.2 of the DSU.[27]

23. Second, to the extent that China sought to challenge Expiry Review 487 and Expiry Review 517, China failed to cite the relevant provision of the WTO Agreements related to expiry reviews, Article 11.3 of the Anti-Dumping Agreement. China therefore failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in accordance with Article 6.2 of the DSU.[28] China cannot bring a separate and standalone claim under Article 2 without citing Article 11.3 of the Anti-Dumping Agreement in its panel request.[29]

24. Third, to the extent China sought to challenge Stainless Steel Sinks Interim Reviews 352, 459, and 461 (and noting China only raised arguments after the first Panel meeting[30]), China failed to cite Article 11.2 of the Anti-Dumping Agreement. Having failed to cite the requisite article of the Anti-Dumping Agreement to challenge these reviews, the interim reviews are similarly outside the Panel's terms of reference.[31]

25. Australia has addressed in detail the many jurisdictional flaws in China's AD claims under section B.1 of China's panel request in its written submissions, opening statements, closing statements, and responses to panel questions.[32] Australia respectfully requests that the Panel find all of China's AD claims against wind towers and stainless steel sinks are outside the Panel's terms of reference.

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[23] China's second written submission, para. 40; China's response to the PRR dated 4 January, para. 55.
[24] Australia's second written submission, paras. 39-43.
[25] China's response to the PRR dated 4 January, paras. 33-48.
[26] Australia's second written submission, paras. 44-58.
[27] See Australia's first written submission, paras. 54-79.
[28] Australia's second written submission, para. 62 and fn. 58 citing Appellate Body Report, *Korea – Dairy*, para. 124, in which the Appellate Body found that:

> Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all.

[29] Australia's first written submission, paras. 95-101; Australia's second written submission, paras. 104-113.
[30] China's response to Panel question no. 37, paras. 112-117.
[31] Australia's second written submission, paras. 122-129.
[32] Australia's PRR dated 16 December 2022; Australia's additional PRR comments dated 12 January 2023; Australia's first written submission, paras. 222-139 and 657-666; Australia's opening statement at the first Panel meeting, paras. 15-41; Australia's closing statement at the first Panel meeting, paras. 4-12; Australia's responses to the Panel questions, particularly Panel questions no. 6-10 and 42-60, as summarised in Australia's second written submission, para. 15.

V. RESPONSES TO AD CLAIMS: RAILWAY WHEELS

A. DOMESTIC FRAMEWORK

26. China's AD claim 3 and consequential AD claims in relation to railway wheels fundamentally misconceive the function of the "competitive market cost" findings made by the ADC in its determination of antidumping duties.[33] Its flawed understanding of how "competitive market costs" are applied under Australia's domestic framework flowed through to its understanding and interpretation of the ADC's reports. In turn, this led China to assert that the ADC made WTO-inconsistent findings under the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement wherever the term "competitive market cost" is used.[34] This is simply incorrect. Contrary to China's erroneous claims, the ADC's findings and determinations were entirely consistent with the Anti-Dumping Agreement.

27. The ADC's consideration of whether exporters' records reflect the concept of "competitive market costs" is not intended as, and does not operate as, a mirror of Article 2.2.1.1 of the Anti-Dumping Agreement.[35] Section 43(2) of the Customs (International Obligations) Regulation 2015 (formerly Regulation 180(2) of the *Customs Regulations 1926*) imposes a narrow positive obligation to *use* exporter records where the prescribed criteria are satisfied, including where the records "reasonably reflect competitive market costs".[36] The provision at issue says nothing about how to calculate the cost of production if the prescribed criteria are not met.[37] Where the records do not "reasonably reflect competitive market costs", the Minister or Parliamentary Secretary has a degree of discretion as to how to construct the cost of production.[38] That discretion must be exercised, and was exercised in the railway wheels investigation, in a manner that complies with the requirements of the Anti-Dumping Agreement, including the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.[39]

B. AD CLAIM 3

1. Australia acted consistently with Article 2.2.1.1 of the Anti-Dumping Agreement in departing from the exporter's records

28. China's AD claim 3 with respect of railway wheels has shifted throughout the dispute and by the close of submissions included several layers of alternative argument.

29. China originally submitted under AD claim 3 that the ADC made an improper finding under the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement because Railway Wheels Investigation 466 Report contained the phrase "reasonably reflects competitive market costs."[40] This contention was clearly wrong.[41] China fundamentally misunderstands the ADC's findings. The ADC's decision to depart from Masteel's records for a single cost item—steel billet—was *not* pursuant to the second condition of Article 2.2.1.1. Rather, the ADC expressly found that the circumstances in

[33] This finding was made under section 43(2) of the *Customs (International Obligations) Regulation 2015*, which was in effect during the railway wheels investigation. The previous version of this provision, regulation 180(2) of the *Customs Regulations 1926*, was in effect during the wind towers and stainless steel sinks investigations. See, e.g., Australia's first written submission, paras. 146-147; Australia's second written submission, paras. 144, 235, 316; Australia's comments on China's responses to Panel question no. 80, para. 66.

[34] See, e.g., Australia's first written submission, paras. 146-147; Australia's second written submission, paras. 144, 235, 316; Australia's comments on China's responses to Panel question no. 80, para. 66.

[35] See, e.g., Australia's first written submission, para. 148; Australia's second written submission, paras. 144, 235, 316; Australia's response to Panel question no. 61, para. 191; Australia's response to Panel question no. 77, paras. 66-67 and Australia's response to Panel question no. 78, paras. 79, 114.

[36] See, e.g., Australia's first written submission, paras. 148-149; Australia's second written submission, paras. 144, 235, 316; Australia's response to Panel question no. 61, paras. 188-192; Australia's response to Panel questions nos. 77 and 78.

[37] Australia's response to Panel question no. 61, paras. 188-192; Australia's response to Panel questions nos. 77 and 78.

[38] Australia's response to Panel question no. 77; Australia's response to Panel question no. 78, para. 78.

[39] Australia's response to Panel's question no. 77, para. 68; Australia's response to Panel question no. 78, para. 78.

[40] China's first written submission, paras. 226-228.

[41] See, e.g., Australia's closing statement at the first Panel meeting, para. 24.

which Masteel's costs were formed were not normal or ordinary under the "normally" term in Article 2.2.1.1.[42]

30. The ADC found that there were systemic and structural imbalances in China's steel and steel input markets, owing to the Government of China's serious and pervasive influence in these markets.[43] The ADC found that these circumstances translated to Masteel's records, and to one specific element of Masteel's costs in particular—its costs for steel billet.[44] On this basis, the ADC found that the circumstances in which Masteel's costs for steel billet were formed were not normal or ordinary. The ADC relied on information other than Masteel's records when calculating the cost of production of steel billet for the purpose of constructing the normal value of railway wheels.[45]

31. The ADC's finding was permissible under Article 2.2.1.1 and consistent with the actions of an unbiased and objective investigating authority.[46] The ADC acted consistently with Article 2.2.1.1 of the Anti-Dumping Agreement in departing from Masteel's records when calculating the cost of steel billet in Railway Wheels Investigation 466.[47]

2. There is no mandatory order of analysis or decision making in the first sentence of Article 2.2.1.1

32. China's next layer of argument was that the ADC was not entitled to make a finding on the basis of "normally" because the ADC was obligated to first make affirmative findings under the first and second conditions of Article 2.2.1.1, in order to have recourse to "normally".[48]

33. This purported requirement for a mandatory order of analysis in the first sentence of Article 2.2.1.1 has no basis in the Anti-Dumping Agreement. There is nothing in the text or structure of Article 2.2.1.1 that suggests, let alone mandates, a particular order of analysis. Nor does the context or purpose of Article 2.2.1.1 support the existence of a sequencing requirement.[49]

34. To the extent that the panel in *Australia – Anti-Dumping Measures on Paper* found that there is a mandatory order of analysis within Article 2.2.1.1,[50] this approach should not be followed. It is inconsistent with the plain text of the Anti-Dumping Agreement.[51]

35. Read as a whole, Article 2.2.1.1 provides an obligation for an investigating authority to use exporters' records as the basis of cost calculations for the purpose of constructing normal value, provided that certain conditions are met.[52] This obligation only applies where:

a) circumstances are normal;

b) the records are in accordance with the generally accepted accounting principles of the export country; and

c) the records reasonably reflect the costs associated with the production and sale of the product under consideration.[53]

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[42] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 24, 80 and 95. Australia's first written submission, paras. 192-246; Australia's second written submission, paras. 181-186; Australia's response to Panel question no. 61, para. 193. Australia's response to Panel question no. 78, paras. 81–84.

[43] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 24, 80, 95.

[44] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 24, 80, 95.

[45] See Australia's first written submission, paras. 192-246.

[46] Article 11 of the DSU, and Articles 17.5(ii) and 17.6(i) of the Anti-Dumping Agreement; Panel Report, *US – Softwood Lumber VI,* para. 7.15. Further, where the Panel finds that a relevant provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations. See Article 17.6(ii) of the Anti-Dumping Agreement.

[47] See Australia's first written submission, paras. 192-249.

[48] China's opening statement at the first Panel meeting, para. 71. See also China's closing statement at the first Panel meeting, paras. 11-12.

[49] Australia's second written submission, paras. 146-180; Australia's opening statement at the second Panel meeting, paras. 43-49.

[50] See China's second written submission, para. 201 citing Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.117.

[51] Australia's second written submission, paras. 146-180; Australia's opening statement at the second Panel meeting, paras. 43-49.

[52] Australia's second written submission, paras. 146-180; Australia's opening statement at the second Panel meeting, paras. 43-49.

[53] See Australia's second written submission, paras. 146-180.

36. These three circumstances are not mutually exclusive, nor are they contingent on one another.[54]

3. China's *arguendo* arguments regarding "normally" are internally inconsistent and lack merit

37. Lastly, China has provided several mutually inconsistent interpretations of the content of "normally." The first interpretation of "normally" that China advanced was that the term should be given no independent meaning distinct from the first and second conditions provided for in Article 2.2.1.1.[55] Such an interpretation is incompatible with the ordinary principles of treaty interpretation. Previous WTO panels and the Appellate Body have consistently found that the term "normally" must be given meaning and effect.[56]

38. The second interpretation China advanced was that cost records were not required to be used where there is a "compelling reason to doubt the accuracy, completeness, faithfulness and reliability of a cost or costs kept in the records".[57] On China's account, the content of "normally" is limited to where there has been a "peculiarity of a reason" why the records would not already have been caught by the first and second conditions.[58] This interpretation reduces the content of "normally" to the same content as the second condition of Article 2.2.1.1, and similarly fails to give "normally" meaning and effect. It is implausible that the parties to the Anti-Dumping Agreement deliberately included the broad term "normally" alongside the more specific first and second conditions, but intended to give "normally" no more than inutile incremental additional meaning.

39. In response to Panel question no. 106, China advanced a third interpretation of "normally." China contended that "normally" modifies *only* the verb "calculated",[59] and therefore, "'*normally*' concerns *only* calculation issues or calculation methodology issues ... "[60] This interpretation is irreconcilable with the plain meaning, structure, and evident purpose of the first sentence of Article 2.2.1.1. On its plain terms, the grammatical effect of "normally" is to modify the phrase, "shall … be calculated."[61] The practical effect is to qualify the obligation of the investigating authority to calculate the costs on the basis of an exporter's records. That is, in circumstances which are not "normal", an investigating authority may derogate from its obligation to calculate costs on the basis of an exporter's records.

40. In Australia's view, the clear focus of Article 2.2.1.1 is on the costs recorded in an exporter's records, and whether those records provide a sound basis for calculating the costs of production and sale of the product under consideration.[62] In any event, the Panel need not provide a precise definition of "normally" in order to resolve the issues in this dispute, nor should the Panel seek to delineate all circumstances when an investigating authority may invoke it.[63] Assessing whether circumstances are not normal and ordinary is an inherently fact-specific examination.[64]

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[54] See Australia's second written submission, paras. 146-180.

[55] China's second written submission, para. 247(a).

[56] Australia's first written submission, paras. 185-188 citing Appellate Body Reports, *US – Clove Cigarettes*, para. 273, *EU – Biodiesel (Argentina)*, para. 6.71; Panel Reports, *China – Broiler Products*, para. 7.161, *EU – Biodiesel (Argentina)*, para. 7.227, *EU – Biodiesel (Indonesia)*, para. 7.65, *Australia – Anti-Dumping Measures on Paper*, paras. 7.111, 7.115.

[57] China's second written submission, paras. 247(b).

[58] China's second written submission, para. 234.

[59] China's response to Panel question no. 106, para. 224.

[60] China's response to Panel question no. 106, para. 224.

[61] Australia's first written submission, para. 184 citing Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.111.

[62] Australia's response to Panel question no. 79, para. 121.

[63] See Australia's first written submission, para. 191; Australia's second written submission, para. 186.

[64] See, e.g., Australia's first written submission, para. 191; Australia's second written submission, para. 186; Australia's response to Panel question no. 106, para. 232; Australia's response to Panel question no. 79, para. 140, fn. 126:

> Australia notes that this fact and circumstance-specific interpretation of "normally" was adopted by the panel in *Pakistan – BOPP Film (UAE)*. While that panel's focus was on the use of the term "normally" in the different context of Article 11.4 of the Anti-Dumping Agreement, it is clear from the panel's reasoning that an analogy was to be drawn with the use of "normally" in Article 2.2.1.1. That panel report has been appealed by Pakistan, but the notice of appeal (as far as Australia is aware) does not refer to the panel's findings relating to the interpretation of Article 11.4 of the Anti-Dumping Agreement.

41. China's AD claim 3 with respect to railway wheels does not have merit, and therefore the Panel should reject this claim.

C. AD CLAIM 1

42. In AD claim 1, China contended that out-of-country data can *never* be used by an investigating authority to determine "cost of production in the country of origin".[65] China's interpretation is irreconcilable with the text of Article 2.2 and is inconsistent with the observations of the Appellate Body in *EU – Biodiesel (Argentina)*.[66]

43. In the facts and circumstances of the ADC's railway wheels investigation, the ADC acted consistently with the requirements of Article 2.2 of the Anti-Dumping Agreement in its reliance on data external to Masteel's records as the basis for constructing steel billet costs in China.[67]

44. Further, the ADC acted consistently with the requirements under Article 2.2 by adapting the out-of-country reference data to Masteel's circumstances as an integrated steel producer in China.[68] The ADC properly relied on data external to Masteel's records as the basis for constructing steel billet costs in China under Article 2.2 of the Anti-Dumping Agreement. Having determined that recourse to French data was appropriate based on the record evidence, the ADC proceeded to make the necessary adjustments, adapting the data sourced from outside China to Masteel's circumstances in China. It did this on the basis of the information that was available to it and appropriate to use on the facts of the investigation.[69]

45. Contrary to China's arguments, the ADC was under no obligation to adapt the external reference data in a manner that would reintroduce the market distortions that the ADC sought to redress. As the Panel alluded to in question no. 21,[70] China appears to claim that – through its choice of reference data under Article 2.2 – the ADC should have reintroduced the very same distortions that the ADC legitimately excluded under Article 2.2.1.1. This would be nonsensical.[71]

46. The ADC acted consistently with Article 2.2 of the Anti-Dumping Agreement in determining an appropriate cost of production in the country of origin. The Panel should, therefore, reject China's AD claim 1.

D. AD CLAIM 5.D

47. China argues, through AD claim 5.d, that Australia did not properly determine the exporter's cost of production, because the ADC used the cost of an input to production, steel billet, where the exporter did not have an identical cost in its financial records because steel billet was self-made by the exporter from raw materials.[72]

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[65] China's opening statement at the first Panel meeting, paras. 45-46.

[66] Australia's first written submission, paras. 279-283; Australia's opening statement at the first Panel meeting paras. 61-63; Australia's closing statement at the first Panel meeting, paras. 17-21; Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70:

> We observe that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin. An investigating authority will naturally look for information on the cost of production "in the country of origin" from sources inside the country. At the same time, these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country.

[67] Australia's second written submission, paras. 196-198.

[68] Australia's second written submission, para. 200.

[69] Australia's first written submission, paras. 298-300; Australia's second written submission, paras. 199 to 201.

[70] Panel question no. 21:

> To both parties - If non-Chinese surrogate costs were properly used by the ADC to construct normal values, consistent with Articles 2.2.1.1 and 2.2, would the adjustments that China advocates have led the ADC to essentially revert back to the exporters' actual costs to construct normal values? Would such a result make legal or practical sense? Please explain.

[71] Australia's second written submission, para. 197.

[72] China's panel request, section B.1.5.

48. It remains unclear from China's submissions what it contends to be the legal basis for AD claim 5.d.[73] To the extent that AD claim 5.d relates to Australia's obligation under Article 2.2 to assess costs of production in the country of origin, it is duplicative of AD claim 1.

49. China originally argued that AD claim 5.d as it relates to Article 2.2.1.1 "deals with the issue of what a 'cost' is, in the records of an exporter, for the purposes of answering the question of whether the records 'reasonably reflect the costs associated with the production' of the product concerned' under Article 2.2.1.1".[74] That is, China framed this claim as being an offshoot of China's AD claim 3 argument that the ADC misapplied the second condition of Article 2.2.1.1. This argument is predicated on China's incorrect assumption that the ADC's decision was based on a negative finding under the second condition of Article 2.2.1.1. The ADC resorted to information external to Masteel's records pursuant to a finding under the "normally" term of Article 2.2.1.1, not pursuant to a finding under the second condition.

50. China subsequently argued that the ADC failed to discharge its obligation under Article 2.2.1.1 by calculating a cost (of steel billet) that was not genuinely related to Masteel's production and sales of railway wheels.[75] China's argument is unsupported by the record. It is clear from the facts of Railway Wheels Investigation 466 that there was a genuine relationship between Masteel's steel billet costs and Masteel's costs of producing and selling railway wheels.[76]

51. The ADC properly evaluated the record evidence and acted in an objective and unbiased manner when it determined that calculating costs at the level of steel billet was appropriate for the purpose of constructing the cost of production of railway wheels. China's claim has no discernible legal basis. The Panel should reject China's AD claim 5.d.

E. AD CLAIM 6.A

52. China alleged that the ADC failed to make "due allowances" to ensure a fair comparison between the export price and constructed normal value under Article 2.4 of the Anti-Dumping Agreement, because it did not apply "allowances" that would have had the effect of entirely reversing the construction of normal value under Article 2.2 of the Anti-Dumping Agreement. According to China, "due allowance that reverses the margin calculation's non-compliance with the requirements of Articles 2.1, 2.2 and 2.4 would be perfectly fitting."[77]

53. China's complaints about the construction of normal value are the subject of AD claims 3 and 1. To the extent AD Claim 6 reagitates those points, this claim is purely consequential and duplicative of China's earlier claims. But, China's AD Claim 6 also takes the nonsensical further step of arguing that, even if the Panel finds normal value was properly constructed, the ADC was obliged to apply adjustments to reintroduce the very distortions that the ADC deliberately removed from its normal value calculation.

54. Article 2.4 requires investigating authorities to make adjustments to export price and/or normal value to allow for a fair comparison. It is not a mechanism for investigating authorities to re-engineer normal value at the comparison stage of the margin calculation.[78] China's approach is legally impermissible and makes no practical sense.

55. If China fails on AD claims 1 and 3, China must also fail on AD claim 6.a.[79] If China succeeds on AD claims 1 and 3, AD claim 6a is legal impermissible and must nevertheless fail.[80]

F. AD CLAIM 7.B

56. In AD Claim 7.b China alleges that the ADC did not determine the profit rate on the basis of the exporter's sales in the domestic market; and complains that the profit rate assessed was applied

[73] Australia's second written submission at paras. 209–214.
[74] China's first written submission, para. 308.
[75] China's response to Panel's question no. 15, paras. 49-54.
[76] Australia's first written submission, paras. 260-265.
[77] China's opening statement at the first Panel meeting, para. 93.
[78] Panel Report, *EU – Biodiesel (Argentina),* para. 7.296; Panel Report, *Egypt – Steel Rebar,* para. 7.333; Panel Report, *EU – Footwear (China)*, para. 7.263.
[79] Australia's second written submission, para. 268.
[80] Australia's second written submission, para. 268.

to the exporter's cost of production as computed by the ADC rather than the Chinese exporter's unadjusted recorded cost of production.[81]

57. The ADC used Masteel's actual sales data to calculate the profit component of the constructed normal value, using as its basis Masteel's sales figures from its "Wheels Division".[82] This data was the verified information available to the ADC.[83] The record shows that Masteel had positively suggested that the ADC use this data for this purpose.[84]

58. China's further allegation that Australia improperly applied the profit ratio to an out-of-country cost of production is entirely consequential on China's earlier claims, in particular AD claim 1. Given that China has failed to make a *prime facie* case in support of AD claim 1, China has also failed to make a *prima facie* case for AD claim 7.b.[85]

G. AD CLAIM 8

59. China's AD claim 8 under Article 9.3 of the Anti-Dumping Agreement is entirely consequential on China's other claims. [86] Since China's other claims fail, so too must AD claim 8.

VI. CONDITIONAL RESPONSES TO AD CLAIMS: STAINLESS STEEL SINKS

60. Even if the AD measures relating to stainless steel sinks – Investigation 238, Interim Reviews 352, 459, 461, and Expiry Review 517 – were within the Panel's terms of reference, all of China's AD claims would fail. China failed to demonstrate that an unbiased and objective investigating authority, considering the evidence that was before the ADC, *could not* have reached the ADC's conclusions. Further, China has failed to make a *prima facie* case for AD claims 1, 2, 3, 6.a, 6.b.i, 7.a and 8 for Interim Reviews 352, 459, 461 and Expiry Review 517.[87]

A. AD CLAIM 3

1. Regulation 180(2) is not the second condition of Article 2.2.1.1

61. China's argument that the ADC's findings in Stainless Steel Sinks Investigation 238 Report made for the purposes of regulation 180(2) were also findings to reject records for the purposes of the second condition of Article 2.2.1.1 is without merit.[88]

62. In Investigation 238 Report, the ADC found that the criteria in regulation 180(2) were not met.[89] The ADC therefore conducted a further evaluation of whether to use the exporters' records under Article 2.2.1.1, as discussed further in the following section.[90] In this further evaluation, the ADC properly departed from the exporters' records with respect to a single cost item – 304 SS CRC – in accordance with the second condition of Article 2.2.1.1.[91]

2. The ADC's second condition finding

63. The ADC considered that the exporters' recorded costs for 304 SS CRC did not reasonably reflect the actual costs of 304 SS CRC associated with the production and sale of stainless steel

[81] China's first written submission, paras. 431-432.
[82] Australia's first written submission, paras. 337-341.
[83] Australia's response to Panel question no. 31, paras. 88-93.
[84] See *Emails from Percival Legal to ADC, dated 9 June 2018 to 11 June 2018*, (Exhibit AUS-77).
[85] Australia's first written submission, para. 343; Australia's second written submission, para. 229.
[86] Australia's first written submission, para. 344.
[87] Australia's comments on China's response to Panel question no. 95, paras. 87-96.
[88] Australia's first written submission, para. 149; Australia's second written submission, paras. 144-145, 235; Australia's closing statement at the first Panel meeting, para. 24; Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.102-7.103. See *Customs (International Obligations) Regulation 2015*, (Exhibit CHN-41), pp. 36-37.
[89] Australia's second written submission, para. 240; see also para. 145; *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 42.
[90] Australia's second written submission, para. 240; *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 134-136, 146-147.
[91] Australia's first written submission, paras. 362 -381; Australia's second written submission, paras. 237, 241-243; Australia's response to Panel question no. 61, paras. 194. Australia's response to Panel question no. 78, paras. 85-91.

sinks.[92] The operative finding is on page 42 of Investigation 238 Report.[93] A further discussion of the ADC's assessment of the evidence underpinning these findings appears at pages 134 to 136 of Investigation 238 Report.[94] It is clear from page 146 of the Report that in making that finding the ADC expressly considered the specific terms of the second condition of Article 2.2.1.1, as distinct from its consideration of its obligations under regulation 180(2).[95]

64. The ADC found that the recorded costs in the exporters' records were not an accurate and reliable reflection of the costs of 304 SS CRC actually incurred.[96] This determination was based on the ADC's finding that 304 SS CRC prices in China were affected by the Government of China's influence in the iron and steel industry, which had a distorting effect on the 304 SS CRC market.[97] The record evidence demonstrated that the Government of China's influence in the 304 SS CRC market in China distorted the market overall.[98]

65. In light of this finding, the ADC concluded that the exporters' recorded costs for 304 SS CRC did not reasonably reflect the costs associated with the production and sale of the product under consideration and, therefore, could not be relied upon for the construction of normal value. Given the record before the ADC this was a conclusion that could have been reached by an unbiased and objective investigating authority.

66. Accordingly, China's AD claim 3 in relation to Investigation 238 should fail.[99]

B. AD CLAIM 1

67. China's AD claim 1 is premised on a mischaracterisation of the ADC's analysis and findings in Investigation 238 Report.[100] China considers there was a "simple substitution" of Chinese data for European data, even though the Report demonstrates that the ADC's analysis resulted in an appropriate and tailored constructed cost.[101]

68. First, the ADC considered whether it could use in-country data.[102] The record evidence before the ADC indicated that using in-country data would have reintroduced the distortions identified in the 304 SS CRC market in China that had informed the ADC's decision to depart from the exporters' recorded 304 SS CRC costs in the first place.[103] As such, in-country data could not be used.

[92] Australia's first written submission, paras. 362-381; Australia's second written submission, para. 241; Australia's response to Panel question no. 61, paras. 194. Australia's response to Panel question no. 78, paras. 85-91.

[93] Australia's first written submission, para. 374-380; Australia's second written submission, para. 241; Australia's response to Panel question no. 61, para. 194; Australia's response to Panel question nos. 85-91.

[94] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 134-136. See also Australia's first written submission, paras. 362-381; Australia's second written submission, para. 241; Australia's response to Panel question no. 61, paras. 194. Australia's response to Panel question no. 78, paras. 85-91.

[95] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 146. See also Australia's first written submission, paras. 362-381; Australia's second written submission, para. 241.

[96] Panel Reports, *EU – Biodiesel (Argentina)*, fn. 400, *EU – Biodiesel (Argentina)*, para. 7.232; see also Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33. See also Australia's first written submission, paras, 374-380; Australia's second written submission, paras. 245-246. Australia's second written submission, paras. 245-246.

[97] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 40-42, 134-136. Australia's second written submission, para. 241. Australia's first written submission, paras. 362 -381; Australia's response to Panel question no. 78, paras. 85–109.

[98] Australia's first written submission, paras. 376-378; Australia's second written submission, para. 249.

[99] Australia's second written submission, para. 251.

[100] Australia's second written submission, paras. 254-255.

[101] Australia's second written submission, para. 255; Australia's first written submission, paras. 383-386.; c.f. China's opening statement at the first Panel meeting, paras. 55-59.

[102] Australia's second written submission, para. 259; Australia's first written submission, paras. 387-391.

[103] Australia's second written submission, paras. 254-255, 258-259; Australia's first written submission, paras. 387-391. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 207-208; *Stainless Steel Sinks Investigation 238 – PAD,* (Exhibit AUS-48), p. 28; *Stainless Steel Sinks Investigation 238 – SEF*, (Exhibit AUS-49), pp. 182-183; *Stainless Steel Sinks Investigation 238 – SEF*, (Exhibit AUS-49), pp. 182-183; [[***]] (Exhibit AUS-52 (BCI)) p. 9.

69. Second, the ADC considered seven potential out-of-country sources of reference data that were on the record.[104] The ADC assessed the available data and arrived at an appropriate proxy that was: (a) limited to the steel grade in question (304 SS CRC);[105] (b) not overly narrow (e.g., sourced from a single buyer purchasing the input predominantly from a single supplier);[106] (c) derived from independent sources;[107] and (d) unaffected by distortions in the 304 SS CRC market in China.[108] Ultimately, the ADC determined that the MEPS-based average price for 304 SS CRC using the monthly reported MEPS North American and European prices was suitable for its purpose.[109]

70. Third, the ADC did not "simply substitute" this reference data.[110] Informed by the record evidence, the ADC adapted the data to arrive at an appropriate proxy for the cost of production in China. It incorporated the verified delivery costs of 304 SS CRC in China and the verified per tonne slitting cost, where that cost had been incurred by exporters when purchasing 304 SS CRC.[111]

71. An unbiased and objective authority could have reached the conclusions of the ADC in Investigation 238.[112] China's AD claim 1 must, therefore, fail.[113]

C. AD CLAIMS 2 AND 4

72. There is no factual dispute between the parties regarding the ADC's approach to determining the below-cost sales in the ordinary course of trade (OCOT) in Investigation 238 Report.[114] Further, the parties agree that costs determined under Article 2.2 apply to the OCOT determination in Articles 2.1 and 2.2.1.[115] Considering this, Australia understands that AD claim 2 is consequential on AD claim 1 with respect to Investigation 238 and, AD claim 4 is consequential on AD claim 3 with respect to Investigation 238.[116]

73. Therefore, China's AD claims 2 and 4 must fail because China's AD claims 1 and 3 must fail with respect to Investigation 238.[117]

D. AD CLAIM 6.A

74. As in the case of Railway Wheels Investigation 466, China's AD claim 6.a in relation to stainless steel sinks impermissibly conflates the calculation of normal value with fair comparison under Article 2.4 of the Anti-Dumping Agreement. It is an attempt to challenge the basis of the cost of production in the Stainless Steel Sinks Investigation 238 through the guise of Article 2.4 adjustments.[118] If

[104] Australia's second written submission, paras. 254-255, 258, 260; Australia's first written submission, paras. 392-393. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 209-217.
[105] Australia's second written submission, paras. 254-255, 258, 260; Australia's first written submission, para. 394. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 213.
[106] Australia's second written submission, paras. 254-255, 258, 260; Australia's first written submission, para. 394. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 215.
[107] Australia's second written submission, paras. 254-255, 258, 260; Australia's first written submission, para. 394. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 216.
[108] Australia's second written submission, paras. 254-255, 258, 260; Australia's first written submission, para. 394. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 213.
[109] Australia's second written submission, paras. 254-255, 258, 260; Australia's first written submission, paras. 395-397. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 217.
[110] Australia's second written submission, paras. 254-255, 261.
[111] Australia's second written submission, paras. 254-255, 258, 261; Australia's first written submission, paras. 398-405. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 217-219.
[112] Australia's first written submission, para. 406; Australia's second written submission, para. 262.
[113] Australia's first written submission, para. 406; Australia's second written submission, para. 262.
[114] Australia's second written submission, para. 265. See also Australia's first written submission, paras. 407-411.
[115] Australia's second written submission, para. 265. See also Australia's first written submission, paras. 407-411.
[116] Australia's first written submission, paras. 407-411; Australia's response to Panel question no. 2, para. 2. In the interests of clarity, Australia uses the descriptions consequential and dependent to mean the same thing: that if no contravention were established under one claim, then the other claim must likewise fail as it depends on the success of the anterior claim. See Australia's response to Panel question no. 12, para. 29.
[117] Australia's second written submission, paras. 263-266. See also Australia's first written submission, paras. 407-411.
[118] Australia's second written submission, para. 267.

China fails on AD claims 1 and 3, China must also fail on AD claim 6.a. If China succeeds on AD claims 1 and 3, China's AD claim 6.a should nevertheless fail.[119]

E. AD CLAIM 6.B

1. AD claim 6.b.i

75. AD claim 6.b.i focuses on the ADC's calculation of a due allowance for VAT under Article 2.4 with respect to Investigation 238. China made two related submissions. The first was that the ADC did not provide a reasoned and adequate explanation or there was no evidence before the ADC that the difference in the VAT recoverability rate had any impact or any likely impact on price comparability.[120] The second was that "even if the VAT liability differences did have an impact on price comparability, then the allowance to account for that difference should have been made on its merits" i.e., that the adjustment should have been computed based on the exporters' recorded costs, not on the costs computed by the ADC.[121]

76. Both arguments are without merit. In carrying out the obligation to make a due allowance on its merits under Article 2.4, there is no particular methodology or "specific rules" that an investigating authority must apply.[122] The issue before the Panel is whether the approach adopted was one which an unbiased and objective authority could have used.

77. In response to China's first submission, the ADC relied on clear evidence on the record that there was an actual, quantifiable difference in the VAT liability for export sales as compared to domestic sales. Given the evident difference in tax treatment, as reported by the investigated companies themselves, the ADC determined that this VAT liability difference likely had an impact on price comparability.[123] In doing so, the ADC adopted a method for calculating due allowance adjustments for taxation that was based on evidence on the record and consistent with Article 2.4.[124]

78. Contrary to China's second submission, the ADC's approach to the VAT due allowance was merited. If China's approach was accepted and the adjustment was made by application of the adjustment rate to the exporters' recorded costs, instead of the constructed costs, there would be an illogical dissonance between the adjustment value and the constructed value to which that adjustment would be applied. Under China's proposed approach, the ADC would effectively be recalculating the cost of production on a different basis.[125] The ADC's approach was consistent with Australia's obligations under Article 2.4 of the Anti-Dumping Agreement.[126]

2. AD claim 6.b.ii

79. China's AD claim 6.b.ii concerns one exporter, Primy, and is limited to Expiry Review 517. Even if Expiry Review 517 is within the Panel's terms of reference (which Australia argues it is not), the ADC acted consistently with Article 2.4 in relation to calculating due allowances for differences in accessories by (a) not including an additional amount for profit for externally purchased accessories; and (b) averaging externally sourced domestic accessory costs for each MCC to calculate the downward adjustment to the normal value.[127]

80. Australia agrees with China that differences in physical characteristics between the export and the domestic model should be quantified, and adjustments should be made to prices to account for these differences.[128] The disagreement between Australia and China is with respect to the methodology used to quantify these cost differences.

81. The issue raised by the first part of China's claim is that, as part of determining the value of accessories, the ADC assigned a profit margin to accessories that were manufactured in-house and

[119] Australia's second written submission, para. 268.
[120] Australia's first written submission, para. 415; Australia's second written submission, para. 272.
[121] Australia's first written submission, para. 415.
[122] Australia's first written submission, paras. 417-423.
[123] Australia's first written submission, paras. 424-431; Australia's second written submission, paras. 272-273.
[124] Australia's second written submission, paras. 272-274.
[125] Australia's second written submission, paras. 275-279.
[126] Australia's first written submission, paras. 432-435.
[127] Australia's first written submission, paras. 436-455; Australia's second written submission, paras. 280-290.
[128] Australia's first written submission, para 417-418.

did not assign a profit margin to accessories that were purchased from third parties. The ADC took this approach because it assessed that the price paid for third-party sourced accessories would include a profit margin (i.e., the profit of the third party), whereas the cost to make for in-house produced accessories did not include a profit. The reason for the different approaches was fully explained by the ADC as follows: the purchase price of the third-party produced accessories reflected the market value of the item, and therefore already included an amount for profit.[129] The ADC reached this position after an extensive dialogue with exporters and taking their views and the evidence into account.[130]

82. In relation to the second part of China's claim, the ADC sought and relied on the information from the exporters to develop an MCC structure and assess differences between domestic and export sales.

83. The averaging (and deduction) of domestic accessory costs for each MCC was: (a) based on an MCC structure that was developed taking into account comments from the exporters; and (b) designed to help generate fair price comparisons across MCCs that were sold with different accessories.

84. The ADC's quantification of accessory costs incorporated Primy's data for its domestic and export sales, was on its merits and was appropriate in the circumstances.[131] China's AD claim 6.b.ii should be rejected by the Panel.

3. AD claim 6.b.iii

85. China's AD claim 6.b.iii concerns a single exporter, Zhuhai Grand, and is limited to Expiry Review 517. Even if Expiry Review 517 is within the Panel's terms of reference (which Australia argues it is not), the ADC acted consistently with Article 2.4. China's claim relates to a disagreement with the ADC's approach to computing the adjustment to account for certain product differences between a domestic and an export sale. Australia and China agree that an adjustment is required.[132] China disagreement is with the ADC's approach in accounting for certain product differences between export and domestic products.[133] The ADC's calculations clearly accounted for the differences between export and domestic products and was consistent with its obligations under Article 2.4 of the Anti-Dumping Agreement.[134]

4. AD claim 7.a

86. China's AD claim 7.a alleges that, in Investigation 238, the ADC failed to determine the profits of exporters based on actual data pertaining to production and sales of stainless steel sinks. China's AD claim 7.a is derivative of AD claims 1 and 3.[135] It should be rejected for the reasons set out in Australia's responses to those claims.[136]

87. Contrary to China's allegations, the ADC determined a reasonable amount for profits based on actual data pertaining to production and sales, consistent with Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement. Article 2.2.2 does not otherwise provide for any particular methodology in order to determine the amount for profits.[137]

88. Australia considers that the words "based on" in Article 2.2.2 must be given meaning and effect, in the context and in light of the object and purpose of the Anti-Dumping Agreement. Article 2.2.2 does not require the wholesale adoption of the raw data in the exporters records without exception, such that an investigating authority is precluded from assessing or evaluating that raw data consistent with the disciplines of Articles 2.2.1.1 and 2.2.

[129] Australia's first written submission, para. 440; *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 59.
[130] Australia's first written submission, para. 441.
[131] Australia's first written submission, paras. 444-445; Australia's second written submission, paras. 287-289; Australia's response to Panel's question no. 26.
[132] Australia's second written submission, para. 292.
[133] Australia's first written submission, para. 459.
[134] Australia's first written submission, paras. 456-463; Australia's second written submission, paras. 291-297.
[135] Australia's first written submission, para. 473.
[136] Australia's second written submission, para. 298.
[137] Australia's first written submission, para. 465; Panel Report, *US – Softwood Lumber V*, para. 7.263.

89. An unbiased and objective authority could have reached the conclusions of the ADC in Stainless Steel Sinks Investigation 238 with respect to the profit amount. China's AD claim 7.a should be rejected by the Panel.

F. AD CLAIM 8

90. China's AD claim 8 under Article 9.3 of the Anti-Dumping Agreement is consequential on the Panel finding inconsistency with Article 2 under China's earlier AD claims regarding Investigation 238.[138] As China has not demonstrated any error in its earlier claims, AD claim 8 must fail also.[139]

VII. CONDITIONAL RESPONSES TO AD CLAIMS: WIND TOWERS

91. Australia's primary submission is that all of China's claims regarding the wind towers measures are outside the scope of the Panel's terms of reference.

92. Even if the Panel were to find that Investigation 221 and/or Expiry Review 487 were within the scope of its terms of reference, it should find that China's AD claims fail to make a prima facie case that the wind towers measures are inconsistent with the Anti-Dumping Agreement. [140] Accordingly, China's claims should be rejected.

A. CHINA HAS NOT MADE A PRIMA FACIE CASE THAT THE WIND TOWERS MEASURES ARE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

1. AD claim 3

93. China's argument, under AD claim 3 concerning the ADC's findings in *Wind Towers Investigation 221 Report* is based on a misunderstanding of the findings in the report. China treats the references to "competitive market costs" and regulation 180(2) as a finding under the second condition of Article 2.2.1.1. As discussed in paragraph 26 above, regulation 180(2) says nothing about, and provides no basis for, the rejection of records, and is not the same as findings made under the second condition.[141] The references to it serve a different purpose, and do not reflect a finding on the basis of Article 2.2.1.1.[142] The ADC's distinct finding under the second condition is apparent from the investigation report.[143]

2. AD claim 1

94. China's arguments under claim 1 are predicated on China's contention that the "uplift ratio" was based on the differences between price values associated with a Chinese plate steel producer in a different investigation and "the values associated with Korean and Chinese Taipei plate steel producers".[144] But, as the Wind Towers Report makes clear, Korean and Chinese Taipei plate steel prices had no role in the ADC's calculation of the normal value of wind towers in Investigation 221. This is confirmed in *Confidential Appendix 2 – Wind Towers Investigation 221 Report* which was exhibited in response to Panel question no. 42(a). [145]

3. AD claim 5.c

95. Under AD claim 5.c, China claims that the "cost difference used for the purposes of the so-called 'uplift' was not and could never be considered to have been unbiased and objective".[146] The legal basis for China's arguments is entirely unclear, even after multiple rounds of

[138] Australia's second written submission, para. 311; Australia's first written submission, paras. 550-553. See China's first written submission, paras. 465, 469, 474-475, 477-479.
[139] Australia's second written submission, para. 311; Australia's first written submission, paras. 550-553.
[140] Australia's first written submission, paras. 475-562.
[141] Australia's second written submission, paras. 145, 235, 313, 315-316.
[142] Australia's second written submission, paras. 315-317; Australia's response to Panel question no. 61, para. 195; Australia's response to Panel question no. 78, paras. 110-115.
[143] Australia's response to Panel question 78, para. 88.
[144] China's response to Panel question no. 11, para. 31. See also China's opening statement at the first Panel meeting, paras. 48-49.
[145] [[***]] (Exhibit AUS-75 (BCI)).
[146] China's first written submission, para. 261.

submissions.[147] To the extent that it is predicated on Article 2.2, this claim appears to be wholly subsumed under, and duplicative of, China's AD claim 1.[148]

96. To the extent that China's AD claim 5.c is based on the second condition of Article 2.2.1.1, then there may be a separate aspect of the claim, but there is no legal basis for it.[149] It appears that China's ultimate complaint is that because the second condition of Article 2.2.1.1 uses the phrase "the costs associated with the production and sale of the product", that when an investigating authority engages in a construction of normal value it must only — unequivocally, according to China — have regard to costs of the exporter being considered. This is unsupported by the text of the Anti-Dumping Agreement. China has not established any legal basis for this purported requirement.

4. AD claim 6.a

97. For the same reasons set out above in relation to railway wheels, China AD claim 6.a in relation to wind towers should fail.[150]

5. AD claim 7.a

98. Under AD claim 7.a, China challenges the multiplication of the actual profit rate to the "uplifted cost of production" which it alleges was not "the cost of production in the country of origin".[151]

99. If the calculated cost of production is the correct amount for a "cost of production in the country of origin", then applying an *uncontested actual profit rate* to that amount would result in a "reasonable amount for … profits" that would be consistent with Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement. As such, since China has failed to make a *prima facie* case under AD claim 1, then this claim must also necessarily fail.[152]

6. AD claim 7.c

100. China's claim 7.c that the ADC's findings on like products were inconsistent must fail for the reasons set out in Australia's written submissions.[153] In both the original investigation and expiry review the ADC found that there were sales of like goods in China. However, the ADC found there was an absence of *relevant* sales of like goods for the purpose of determining normal value.[154]

7. AD claim 8

101. China's AD claim 8 is entirely contingent on the Panel finding that Australia acted inconsistently with Article 2 of the Anti-Dumping Agreement under its earlier claims. As outlined above, there is no basis for such findings in each case.[155]

VIII. CONDITIONAL RESPONSES TO CVD CLAIMS

102. Australia's submission is that all of China's claims regarding the stainless steel sinks measures, including China's CVD claims, are outside the scope of the Panel's terms of reference. Specifically, China's CVD claims under section B.2 of its panel request are limited solely to the CVD measures "with regard to" Program 1.

103. Even if the Panel were to find that China's claims involving Program 1 were within its terms of reference, China has failed to demonstrate that ADC acted inconsistently with the SCM Agreement.[156] Accordingly, China's CVD claims should be rejected. Moreover, because any measures relating to Program 1 were terminated with effect from 27 March 2020 there is simply no

[147] Australia's second written submission, paras. 319-320.
[148] Australia's second written submission, para. 320.
[149] Australia's response to Panel question no. 16, paras. 35-36.
[150] Australia's first written submission, paras. 531-536. Australia's second written submission, paras. 323-326.
[151] China's first written submission, paras. 412-416.
[152] Australia's second written submission, paras. 327-329.
[153] Australia's first written submission, paras. 545-549; Australia's second written submission, para. 330.
[154] Australia's response to Panel question no. 29, paras. 83-84.
[155] Australia's second written submission, para. 331.
[156] Australia's first written submission, paras. 563-707.

matter at issue between the parties that this Panel could resolve, nor any measure it could recommend Australia bring into compliance as a result, in accordance with Article 19.1 of the DSU.[157]

A. CVD CLAIM 1

104. China confirmed in bilateral communications with Australia that it would no longer be pursuing any claims related to financial contribution and Article 1.1(a) of the SCM Agreement.[158] Australia notes that China did not advance any arguments with respect to these claims in any of its submissions.

B. CVD CLAIMS 2 AND 3

105. China contends that the ADC was not entitled, in light of the requirements of the SCM Agreement, to disregard in-country prices of 304 SS CRC and challenges the ADC's use of an out-of-country benchmark as well as the associated adjustments.[159]

106. Contrary to China's submission, the ADC:

a) in accordance with Article 14(d) of the SCM Agreement, and previous decisions of the Appellate Body, including in *US – Carbon Steel (India)*, correctly disregarded in-country prices of 304 SS CRC due to pervasive intervention by the Government of China in the market, causing distortions;

b) adopted an out-of-country benchmark that was the best available representation of the market-determined price of 304 SS CRC in China; and

c) adjusted this benchmark for prevailing market conditions in China.[160]

107. The ADC, therefore, acted consistently with the requirements of Articles 1.1(b) and 14(d) of the SCM Agreement, and China's claims should be rejected.[161]

C. CVD CLAIM 4

108. China argued that the ADC failed to properly establish that Program 1 was specific in accordance with Articles 1.2 and 2.1(c) of the SCM Agreement. China alleges four separate inconsistencies. However, China's arguments are unsupported by the facts and WTO law.

109. First, China argues that the ADC did not identify a subsidy programme as required under Article 2.1(c) of the SCM Agreement.[162] But the record shows that the ADC did identify a subsidy programme. Specifically, the ADC identified a systematic pattern of 304 SS CRC being provided to Zhuhai Grand for less than adequate remuneration.[163]

110. Second, China submits Australia failed to consider whether Program 1 was used by a limited number of certain enterprises.[164] China is mistaken. The ADC acted consistently with Article 2.1(c) of the SCM Agreement by showing that access to the subsidy was limited to "certain enterprises" that used 304 SS CRC as a key input. Specifically, the ADC found that access to Program 1 was limited to enterprises engaged in the manufacture of downstream products (including stainless steel sinks) that use 304 SS CRC as a key input.[165]

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[157] PRR, para. 25.
[158] Australia's first written submission, para. 570.
[159] China's first written submission, paras. 481-534.
[160] Australia's second written submission, para. 337. See also Australia's first written submission, paras. 607-617.
[161] Australia's second written submission, paras. 336-364.
[162] China's first written submission, paras. 554-558.
[163] Australia's first written submission, paras. 638, 652-653; Australia's second written submission, paras. 367-371; Australia's response to Panel question no. 91, paras. 175-178.
[164] China's first written submission, paras. 559-560.
[165] Australia's first written submission, para. 639; Australia's response to Panel question no. 92, paras. 179-182.

111. Third, China argues Australia failed to expressly or implicitly take account of the two factors listed in the final sentence of Article 2.1(c) of the SCM Agreement.[166] But the record shows that the ADC complied with the requirements of the final sentence of Article 2.1(c) of the SCM Agreement. The ADC took into account both factors, and its consideration of both factors is indicated in Stainless Steel Sinks Investigation 238 Report.[167]

112. Finally, China contends that the ADC failed to clearly substantiate its determination of specificity on the basis of positive evidence as required by Article 2.4.[168] But, China failed to raise a claim under Article 2.4 of the SCM Agreement in its panel request. Accordingly, China's claims with respect to Article 2.4 of the SCM Agreement fall outside the Panel's terms of reference and, in turn, the Panel should not make any findings or recommendations with respect to this claim.[169]

D. CVD CLAIM 5

113. China makes two allegations under CVD claim 5.

114. First, China alleges that the ADC did not have sufficient evidence that Program 1 was specific to initiate the investigation.[170] Contrary to China's submission, the record shows the application did contain information in relation to the nature of the alleged subsidy. The application provided evidence of the common recipients that used and benefited from a variation of Program 1 investigated by the Canada Border Services Agency.[171]

115. In addition, there was evidence and associated confidential documentation connected with two previous investigations into similar steel products that was not reasonably available to the applicant, but was available to the ADC.[172] The ADC considered this evidence, along with the information provided by the applicant, and concluded that there was a sufficient basis to justify the initiation of an investigation under Article 11.3 of the SCM Agreement. Having regard to all of that evidence, as an objective and unbiased investigating authority, the ADC properly concluded that the evidence was sufficient to justify the initiation of an investigation under Article 11.3 of the SCM Agreement.[173]

116. Second, China claims that one piece of evidence relied on by the ADC to initiate the investigation was "out-of-date" and did not demonstrate that stainless steel sinks were being "presently" subsidised during the relevant period of review.[174] China's argument is focused on a single piece of evidence relied upon, and ignores the surrounding context of all of the other evidence considered by the ADC that covered the period of investigation.[175]

117. The ADC acted consistently with the requirements of Article 11.1, 11.2 and 11.3 of the SCM Agreement. China's claims should fail.

IX. CONCLUSION

118. Australia requests that the Panel find that the entirety of China's claims with respect to the stainless steel sinks and wind towers cases are outside the Panel's terms of reference. In any event, as demonstrated in Australia's submissions and responses to questions from the Panel, the ADC's findings with respect to all three cases are consistent with Australia's obligations under the Anti-Dumping Agreement and the SCM Agreement.

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[166] China's first written submission, paras. 561-565.
[167] Australia's first written submission, paras. 640-641; Australia's second written submission, paras. 372-379.
[168] China's first written submission, para. 566.
[169] Australia's first written submission, paras. 657-666.
[170] China's first written submission, paras. 580-582, 587-588.
[171] Australia's response to Panel question no. 94, paras. 184-188.
[172] Australia's second written submission, para. 390; *Hot Rolled Plate Steel Investigation 198 Report*, (Exhibit CHN-33); *Aluminium Zinc Coated Steel Investigation 193 Report*, (Exhibit AUS-70).
[173] Australia's first written submission, paras. 690-697; Australia's second written submission, paras. 386-400; Australia's response to Panel question no. 35, paras. 99-103; Australia's response to Panel question no. 94, paras. 184-188.
[174] China's first written submission, paras. 583-586, 589.
[175] Australia's first written submission, paras. 698-704; Australia's second written submission, paras. 401-402; Australia's response to Panel question no. 115, paras. 259-260.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

INTRODUCTION

1. Brazil welcomes the opportunity to present its views on the issues raised in these panel proceedings. In Brazil's view, the key elements of the dispute are the interpretation and application of the phrase "particular market situation" in Article 2.2 of the ADA, and the interpretation and application of the term "normally" in Article 2.2.1.1 of the ADA.

2. In this submission, Brazil does not take a position regarding the facts of the dispute, but will present its views on what it considers to be the proper interpretation of those two expressions.

Article 2.2 of the Anti-Dumping Agreement and the existence of a "particular market situation".

3. In the present dispute, China considers that several procedures adopted by Australia's investigating authority in three different investigations were in violation of the ADA. In particular, China claims that Australia failed to use (i) the cost of production in the country of origin and (ii) the exporters' records on costs, thus improperly determining the normal value of Chinese exports.[1]

4. Australia, in its turn, justifies the methodology used by its investigating authority by alleging that its decisions were made on the basis of a "particular market situation" under Article 2.2, and that exporters' records "were not 'normal' within the meaning of Article 2.2.1.1 of the ADA".[2] Australia claims its investigating authority "was required to assess the existence of dumping or subsidization in light of the clear evidence in each case of high levels of Government intervention in relevant parts of the Chinese steel and steel input markets".[3]

5. Article 2.2 sets out the conditions under which an investigating authority may resort to alternative methodologies for reaching a constructed value for the determination of dumping. The existence of a "particular market situation" is one of the situations that justifies the use of such methodologies.

6. There is no clear definition of what constitutes a "particular market situation" in the text of the ADA. In previous disputes in which the term was the subject of appreciation by panels, the main issue was whether price distortions, mainly caused by governmental actions, constituted a "particular market situation".

7. Brazil notes, however, that the mere existence of governmental intervention, by means of regulation or financial assistance, does not constitute *per se* a "particular market situation". For the purposes of Article 2.2, governmental actions are relevant only if they create market distortions that do not permit a proper comparison of domestic and export prices. As found by the panel in *Australia – Anti-Dumping Measures on Paper*, "the phrases 'particular market situation' and 'permit a proper comparison' function together to establish a condition for disregarding domestic market sales as the basis for normal value".[4]

8. In light of this reading, Brazil understands that the text of Article 2.2 entails a double obligation to investigating authorities: first, they must conduct an assessment to demonstrate the existence of a "particular market situation"; secondly, they must examine whether sales done in such a situation "do not permit a proper comparison" of the domestic and the export price.

9. This second step is a qualitative comparison of whether the prices can be properly compared. It should be demonstrated by a reasoned assessment on how a "particular market situation" affects

[1] China's First Written Submission, para. 2.
[2] Australia's First Written Submission, para. 5.
[3] Id., para. 7
[4] Panel Report, *Australia – Anti-Dumping Measures on Paper,* para 7.27.

that comparison. If these two conditions were satisfied, then the investigating authority would be allowed to resort to an alternative method for the constructed value.

10. Turning to the interpretation and application of the word "normally" in the first sentence of Article 2.2.1.1 of the ADA, it should be noted that "normally" is an adverb that means "under normal or ordinary conditions; as a rule; ordinarily".[5] In this case, such a rule is subject to the two conditions expressed in the second part of the first sentence of Article 2.2.1.1: "provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration".

11. Brazil concurs with the interpretation of the panel in *Australia – Anti-Dumping Measures on Paper* that the word "normally" modulates the obligation contained in that article, by providing investigating authorities with enough flexibility to depart from the information provided by exporters, if there are compelling reasons to do so even when the abovementioned two conditions are satisfied.[6]

12. In the present dispute, Brazil considers that the Panel has the opportunity to further clarify the requirements of Article 2.2 and of Article 2.2.1.1. Even if those requirements were satisfied, the Panel may also need to assess if the adjustments made by the investigating authority were proper, unbiased and objective.

CONCLUSION

13. Brazil appreciates the opportunity to comment on these issues in these proceedings and hopes that the viewpoints presented in this submission will prove helpful to the Panel in assessing the subject matter brought before it.

[5] New Shorter Oxford English Dictionary, 2002, p. 1941.
[6] Panel Report, *Australia – Anti-Dumping Measures on Paper,* para. 7.116-7.117.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

1. Thank you Madame Chair

2. Canada thanks the Panel for the opportunity to present its views in this dispute.

3. Canada notes that the Russian Federation is also participating as a third party. Canada informs the Panel that it will not be engaging with the Russian Federation in this proceeding. Canada expresses its solidarity with the Ukrainian people, and condemns in the strongest terms the Russian Federation's unjustifiable and unprovoked invasion of Ukraine. The Russian Federation's unlawful campaign of aggression violates international law and the United Nations Charter, and gravely threatens international peace and security and the rules-based order. Canada demands that the Russian Federation immediately and unconditionally cease the illegal use of force against Ukraine, and withdraw its military forces from within Ukraine's internationally recognized borders. We also call on the Russian Federation to uphold its obligations under international humanitarian law and human rights law, and to protect all civilian populations and infrastructure.

4. This concludes Canada's oral statement. We thank you for your attention.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. PROCEDURAL ISSUES

1.1. Identification of measures / expired measures under Article 6.2 DSU

1. Regarding the question whether the original determinations are within the Panel's terms of reference in view of the fact that they had been replaced by the expiry review two years prior to panel establishment, the EU considers it important to distinguish between two separate legal issues. The first issue concerns the jurisdictional question as to whether China's panel request sufficiently identifies the specific measure(s) at issue. Measures not properly identified fall outside a panel's terms of reference, and cannot be the subject of panel findings or recommendations.[1] In this context, the Appellate Body explained that "the measures at issue must be identified with sufficient precision so that what is referred to adjudication may be discerned from the panel request".[2] China identified both the original and expiry review determinations as relevant measures and clarified that it only challenges Program 1 in this respect. This is sufficient for identification purposes and for Australia to defend itself. The expired measure therefore is within the Panel's terms of reference.

2. The second question relates to the issue as to whether the Panel could or should make findings and/or recommendations on the (expired) original determinations. As a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[3] While this is the starting point of any legal assessment on expired measures, it is not yet the end of the analysis. A long line of case law has developed as to the specific circumstances under which measures may be subject to panel review despite their expiry. A recent panel report recalled the importance of the distinction between cases in which the measures in question had expired before or only after the panel's establishment by the DSB. While panels often make findings (but no recommendations) on measures expired after panel establishment, "in respect of measures withdrawn before panel establishment, panel practice appears to heavily lean against making any findings".[4] The relevance of this temporal distinction was recently confirmed by the Appellate Body in *EU – PET (Pakistan)*.[5] The EU notes that the extensive case law on expired measures – as to whether a panel can make recommendations and/or findings – shows that expired measures do not *per se* fall outside a panel's terms of reference as Australia and some third parties argue – otherwise the question of findings or recommendations would not even arise. Rather, such expired measures are *within* a panel's terms of reference and hence the panel has jurisdiction. However, it will depend on the individual circumstances whether – and to what extent – the panel may *exercise* such jurisdiction. In the present case, the EU considers that there are no circumstances (such as, e.g. lingering effects or risk of recurrence) that would speak in favour of making findings on the expired original determinations. The Panel therefore cannot make findings on the expired original determinations in the present case.

1.2. China's failure to cite Articles 11.3 ADA and 21.3 SCMA (expiry reviews)

3. While the expiry review determinations are within the Panel's terms of reference, the EU considers that China cannot succeed with its claims against the expiry review determinations on substance because China failed to cite Articles 11.3 ADA and 21.3 SCMA in its panel request. The Appellate Body has made clear that "the identification of the treaty provisions is always necessary for purposes of defining the terms of reference of a panel and for informing the respondent of the claims".[6]

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[1] Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 120 and *EC and certain member States – Large Civil Aircraft*, para. 790.
[2] Appellate Body Report, *US – Continued Zeroing*, para. 168.
[3] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[4] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.469.
[5] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.39.
[6] Appellate Body Report, *Korea – Dairy*, para. 124. See also Appellate Body Report, *Russia – Railway Equipment*, para. 5.28.

4. Articles 11.3 ADA and 21.3 SCMA are the specific and central provisions in the Anti-Dumping Agreement and SCM Agreement dealing with expiry review determinations. The obligations arising with respect to an expiry review determination therefore result from the obligations contained in Article 11.3 ADA, or from obligations contained elsewhere in the Anti-Dumping Agreement (e.g., Article 3 ADA), provided they are raised in connection with Article 11.3 ADA. The listing of Article 11.3 ADA, in the EU's view, is therefore essential for a panel request alleging violations with respect to expiry review determinations.

5. Original investigations and expiry review determinations are covered in the two Agreements through different legal provisions because there are important differences between these two types of investigations. In particular, other than the original investigation, the expiry review is a *prospective* determination. The Appellate Body stated in this regard: "In an original anti-dumping investigation, investigating authorities must determine whether dumping exists during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be likely to lead to continuation or recurrence of dumping".[7] For example, with respect to injury, a previous panel found that Article 3 ADA is not directly applicable in case of an expiry review but could only be relevant to the panel's interpretation of the obligations contained in Article 11.3 ADA.[8] A previous panel also pointed to the fact that original investigations and sunset reviews are distinct processes with different purposes. It stated that "in light of the fundamental qualitative differences in the nature of these two distinct processes … it would not be surprising to us that the textual obligations pertaining to each of the two processes may differ".[9] These rulings confirm that Articles 11.3 ADA / 21.3 SCMA must be cited to in a panel request that targets expiry review determinations. In the absence of any reference by the complainant to Articles 11.3 ADA / 21.3 SCMA in the panel request, the claims relating to expiry review determinations fall outside the panel's terms of reference.

6. The EU does not opine as to whether it is necessary to quote Articles 11.3 ADA / 21.3 SCMA for each individual claim relating to expiry review determinations or whether it may be sufficient to quote Article 11.3 ADA once in the panel request (also for multiple claims) in order to allow the respondent to properly defend itself. In the present case, China failed to make *any* reference to Article 11.3 ADA / 21.3 SCMA in its panel request. This means that the violations relating to the expiry review determinations alleged by China are not within the Panel's terms of reference.

1.3. Initiation of an investigation

7. The EU agrees with Australia that an investigating authority is not limited to considering the evidence in the application. There is no indication in the text of Article 5 ADA (or Article 11 SCMA) that an investigating authority is limited to considering only the evidence in the application. On the contrary, Articles 5.3 ADA / 11.3 SCMA require "that authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation." If authorities were limited to evidence contained in the application, they would be hampered, in some cases even unable, to examine the accuracy and adequacy of the evidence provided in the application as required by Articles 5.3 ADA and 11.3 SCMA. There are also numerous panel reports that make clear that investigating authorities may take into account other evidence[10] and that the initiation may even be found WTO inconsistent if the authorities fail to corroborate evidence contained in the application through other evidence.[11]

2. DUMPING DETERMINATION

2.1. Interpretation of "normally" under Article 2.2.1.1 ADA, first sentence

8. The European Union agrees with the panel in *Australia – Anti-Dumping measures on A4 Copy Paper* that an investigating authority may disregard the records of costs kept by the exporter or producer under investigation even if the two conditions in the first sentence of Article 2.2.1.1 ADA are satisfied. By its own terms, the first sentence of Article 2.2.1.1 does not explicitly set

[7] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 107.
[8] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.381.
[9] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.8.
[10] Panel Report, *China – GOES*, para. 7.56; Panel Report, *Mexico – Olive Oil*, para. 7.225; Panel Report, *EC – Bed Linen*, para. 6.199; *Guatemala – Cement II*, para. 8.62.
[11] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.39; Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.380.

out what circumstances may be considered "normal" and what circumstances may be considered "not normal".[12]

9. As explained in prior submissions on this issue[13], the European Union considers that it is necessary to interpret Article 2.2.1.1, and particularly the term "normally", in the overall context of Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement.

10. This flexibility to disregard the records of costs kept by the exporter or producer under investigation in certain circumstances is enshrined not only in the term "normally", which qualifies and modifies the obligation of the investigating authority to calculate costs of production on the basis of producers' records, but also in the term "[f]or the purpose of paragraph 2" which clarifies the purpose of the calculation. That purpose is the determination of dumping and of a normal value (that is, a value that is normal) for the product concerned.

11. Following the definition of dumping, and the introduction of the notions of normal value and price comparability in Article 2.1, Article 2.2 elaborates the rules for determining normal value. When there are no domestic sales of the like product or, for various reasons, such sales cannot be used, the choice lies between a comparable representative price to a third country or a constructed normal value. Article 2.2 contains two sub-paragraphs. Article 2.2.1 focuses on the question of when domestic sales or sales to a third country may be treated as not in the ordinary course of trade by reason of price (when they are below the costs of production plus administrative, selling and general costs). Article 2.2.2 focuses in on how to determine amounts for administrative, selling and general costs and profit "for the purpose of paragraph 2", that purpose being to determine a normal value.

12. Article 2.2.1 itself contains one further sub-paragraph: Article 2.2.1.1. By its own terms, Article 2.2.1.1 is framed as a provision to be applied "for the purpose of paragraph 2". The term "purpose" appears in the singular. To understand the provision properly, we must therefore look back to the single purpose of paragraph 2. We must neither improperly expand nor narrow that single purpose. Nor must we break down paragraph 2 into multiple purposes and arbitrarily select one of them, to the exclusion of others. The single purpose of paragraph 2 is, as we have already observed, to set out rules governing the establishment of a value that is normal or, for short, a normal value. Thus, we must correctly understand the first sentence of Article 2.2.1.1 as requiring that, for the purpose of establishing a normal value, provided that certain conditions are met, costs shall normally be based on the records of the investigated firm.

13. The term normal value is not a defined term. Article 2 ADA elaborates rules that govern the determination of a normal value, but that is not the same thing as a definition. Defining a term has a particular consequence. It means that, in order to understand the defined term, one does not apply the interpretative rules directly to the defined term, but rather to the definition itself. By contrast, if a term is not defined, then it falls to be interpreted in accordance with the customary rules of interpretation of public international law. Therefore, the term normal value, that is, the notion of a value that is normal, falls to be interpreted in accordance with the customary rules of interpretation of public international law.

14. Article VI:1 of the GATT 1994 and the Ad Notes, together with the terms of Article 2 of the Anti-Dumping Agreement, provide immediate and compelling contextual guidance regarding situations that are not "normal".

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[12] By its own terms, Article 2.2.1.1 does indicate some of the circumstances in which it may be justified to reject/replace/adjust specific cost items in the records of the investigated firm. For example, the **second sentence** of Article 2.2.1.1 refers to cost allocations have been "historically utilized" by the investigated firm, in particular as regards amortization, depreciation, allowances for capital expenditures and other development costs. Thus, a specific cost allocation might be in accordance with GAAP and otherwise "reasonably reflect the costs …", but it might not have been "historically utilized" by the investigated firm, as opposed to being specifically engineered for the purposes of completing the questionnaire response. Thus, in such a situation, instead of calculating costs exclusively on the basis of the records kept by the investigated firm, an investigating authority may be entitled to reject/replace/adjust such costs (by definition, by having recourse to information or data exogenous to the records kept by the investigated firm). The same comment applies with respect to the **third sentence** of Article 2.2.1.1 (including footnote 6), which relates to non-recurring items of cost and start-up operations. Also in this situation, instead of calculating costs exclusively on the basis of the records kept by the investigated firm, an investigating authority may be entitled to reject/replace/adjust such costs. The same comment applies with respect to the existence of an **"association or compensatory arrangement"** as referenced in Article 2.3.

[13] See notably as the EU submissions as a party in *EU – Biodiesel* and the EU third party submissions in *Ukraine – Ammonium Nitrate* and *Australia – A4 copy paper*.

15. A value is normal when it results from the normal operation of the market forces of supply and demand. Therefore, in any situation in which a particular item of data has been lawfully rejected as distorted and unreliable because it does not result from the normal operation of the market forces of supply and demand, such item of data does not need to be brought back into the calculation pursuant to Article 2.2.1.1. This is a simple matter of common sense: if a data-point is distorted and unreliable that must be so for the dumping calculation as a whole.

16. Consequently, an investigating authority is permitted, and may even be required, to reject, replace or adjust the costs of production in the records of the investigated firm if those costs are unsuitable to serve as the basis for calculating a constructed normal value due to a "particular market situation".[14]

2.2. The relationship between the term "normally" and the two conditions for considering records kept by exporters as contained in Article 2.2.1.1

17. The European Union is not convinced by the reasoning provided by the panel for interpreting Article 2.2.1.1 as it did with respect to the relationship between the term "normally" and the two explicit conditions for considering records kept by exporters.[15]

18. Because relying on "normally" to reject a company's records constitutes a departure from the "default" rule under Article 2.2.1.1 to use the records, the investigating authority can only do so where it finds a compelling reason to do it. The European Union would not exclude that there may be cases where particular factual circumstances or due process considerations would also justify the need for an investigating authority to provide explanation concerning compliance with the explicit conditions in the context of setting out the reasons for rejecting the records based on circumstances that are not normal or ordinary, but it is not readily apparent why this would flow from an obligation to "give meaning to the whole of the obligation in Article 2.2.1.1". Beyond such circumstances it would not *a priori* seem necessary to include extensive or even explicit findings and reasoning with respect to the two explicit conditions in every case, provided it is clear on which basis the investigating authority decided to reject the records[16] and why and the record confirms that compliance with the relevant conditions has been evaluated.[17]

[14] The meaning of "particular market situation" was not subject to adjudication in *EU – Biodiesel (Argentina).* See: Appellate Body Report, *EU – Biodiesel (Argentina)*, footnote 120. The Panel in *Australia – Anti-Dumping measures on A4 Copy Paper* observed that "[t]he phrase "particular market situation" does not lend itself to a definition that foresees all the varied situations that an investigating authority may encounter that would fail to permit a "proper comparison". In our view, the drafters' choice to use such a phrase should be treated as a deliberate one. Consequently, while the expression "particular market situation" is constrained by the qualifiers "particular" and "market", it nevertheless cannot be interpreted in a way that comprehensively identifies the circumstances or affairs constituting the situation that an investigating authority may have to consider".), See Panel Report, *Australia – Anti-Dumping measures on A4 Copy Paper*, paragraphs 7.21.

[15] Panel report, *Australia – Anti-Dumping Measures on Paper*, para. 7.117.

[16] A respondent could not rely upon "implicit" findings, analyses, or considerations to substantiate a new or different rationale to that articulated by the investigating authority in its determination (To this effect see Panel Report, *Korea – Stainless Steel Bars*, para. 7.41)

[17] It is accepted for example that Article 3.4 ADA allows an investigating authority to undertake an "implicit analysis" of a factor, provided that the record contains evidence that the factor has been evaluated (Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.357).

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Challenges to expired measures

1. The Appellate Body stated in *EC – Chicken Cuts* that "as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[1] This is because the WTO dispute settlement mechanism is not intended to award compensation for disadvantages caused by past measures, but rather to positively solve *existing* disputes.[2]

2. Japan considers that the core question a panel should examine when determining whether to address the claims against anti-dumping or countervailing duty measures is whether the *imposition* of the anti-dumping or countervailing duties continued at the time of panel establishment, and not whether each individual legal instrument had been withdrawn or superseded at the time. This is because, even if determinations made in the context of an *original* investigation have been superseded or "replaced" by an expiry review, certain of the deficiencies in the original determinations may persist and call ongoing measures into question where, for example, the investigating authority relied in its expiry review on the analysis or determinations made in the original investigation. In such a scenario, the panel could examine the alleged deficiencies of the original determination to the extent that it continues to affect the ongoing measures and provided that the relevant measures, including the original determination, are properly identified in the panel request.

II. Panel's terms of reference

3. Article 7.1 of the DSU provides that a panel's terms of reference are based on the description of the panel request.[3] Article 6.2, in turn, requires that a panel request "identify the specific measures at issue" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

4. This means that, in this dispute, China was required to specify not only the measures it intends to challenge but also what aspects of the challenged measures are, in its view, inconsistent with the particular provisions of the Anti-Dumping and/or SCM Agreement.[4] Accordingly, if China intended to challenge the Australian investigating authority's conduct in *expiry reviews*, it would have needed to cite to Article 11.3 of the Anti-Dumping Agreement, which is the provision primarily governing expiry reviews, rather than Articles 2 and 3 of that Agreement, which set out an authority's obligations in an *original* investigation. Although the interpretation of Article 11.3 is to a certain extent informed by Articles 2 and 3, the obligations under the former provision are clearly separate and distinct from those under the latter provisions.[5]

III. Calculation of "normal value" under Articles 2.1, 2.2, and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

A. Interpretation of the word "normally" in the first sentence of Article 2.2.1.1

5. Article VI:1(b) of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement provide that, where there is no comparable domestic price for the exported products at issue, an investigating authority may rely on alternative bases for establishing their normal value, including a formula based on "the cost of production [of the product] in the country of origin". Article 2.2.1.1 further explains that when determining "the cost of production in the country of origin", an investigating authority "normally" must calculate costs on the basis of records

[1] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[2] Article 3.7 of the DSU.
[3] Appellate Body Report, *EC – Selected Customs Matters*, para. 131.
[4] See Appellate Body Report, *US – Carbon Steel*, para. 127.
[5] See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 107.

kept by the exporter or producer, "provided that" the records: (1) are in accordance with the generally accepted accounting principles of the exporting country; and (2) "reasonably reflect the costs associated with the production and sale of the product under consideration".

6. The deliberate insertion of the word "normally" in Article 2.2.1.1 indicates that, even where the two conditions in the "provided that" clause are met, an investigating authority may consider information or evidence *other than* the recorded costs in certain circumstances. Interpreting this provision otherwise would render the term "normally" inutile and redundant, which is clearly inconsistent with customary rules of treaty interpretation embodied in (*inter alia*) Article 31 of the Vienna Convention on the Law of the Treaties. At the same time, in order to give "meaning and effect" to the two conditions, and in light of the ordinary meaning of the word "normally", an investigating authority cannot freely disregard the records where the two conditions are met. Rather, the investigating authority must provide a "compelling reason" to deviate from its obligation to "normally" use the recorded costs and rely on other sources of information.[6]

7. Japan does not presume to define what constitutes "a compelling reason" not to use the recorded costs, but recalls that the costs calculated pursuant to Article 2.2.1.1 "must be capable of generating [an appropriate] proxy"[7] for the normal value calculated pursuant to Article 2.1. Article 2.1, in turn, defines the "normal value" as the "comparable price, in the *ordinary course of trade*, for the like product when destined for consumption in the exporting country".[8] As the Appellate Body has explained, the term "ordinary course of trade" indicates that the normal value must be compatible with "'normal' commercial practice" in the market of the country of origin.[9] In other words, calculation of the normal value under these provisions appears to presume that the prices and/or costs to be used reflect the *normal functioning of the market*.

8. Therefore, as an extreme example, if the prices of all inputs are determined arbitrarily by government regulations, rather than through the normal functioning of the market in the country of origin, there might be a "compelling reason" for an investigating authority to exclude the recorded costs and to seek other information or evidence when calculating the constructed normal value.

B. Evidence other than recorded costs an investigating authority may seek under Article 2.2 of the Anti-Dumping Agreement

9. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement do not clearly stipulate what kinds of information or evidence an investigating authority can use when it deviates from the general rule under Article 2.2.1.1 to use recorded costs, nor do they limit the sources of information or evidence to sources inside the country of origin.[10]

10. Japan submits that the phrase "the cost of production [of the product] in the country of origin" in Article 2.2 and Article VI:1(b)(ii) of the GATT 1994 should be also interpreted in light of the role of these provisions to provide an "appropriate proxy" for the price of the like product if it were sold *in the ordinary course of trade* in the home market. Accordingly, Japan considers that an investigating authority is not precluded from using out-of-country information if the recorded costs do not reflect the normal functioning of the market and the out-of-country information is more probative in arriving at the cost of production in the country of origin.[11]

11. Japan also understands that, given that out-of-country information may be used to "arrive at" the cost of production in the country of origin, an investigating authority may be required to make certain adaptations to that information as appropriate in the specific circumstances of each case.[12]

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[6] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.117.
[7] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.
[8] Emphasis added.
[9] Appellate Body Report, *US – Hot Rolled Steel*, para. 140.
[10] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.
[11] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70 and 6.81.
[12] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

C. Article 17.6(ii) of the Anti-Dumping Agreement

12. Japan submits that the core question that a panel is required to answer under Article 17.6(ii) of the Anti-Dumping Agreement is whether the interpretation of a particular term or provision of the Anti-Dumping Agreement submitted by the party/investigating authority is *permissible* in accordance with the customary rules of treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention.

13. Japan understands that this question has been focused on by the Appellate Body as well as the arbitrators in *Colombia – Frozen Fries*, and in each case, it was found that the interpretation of the relevant provisions asserted by the investigating authority was not permissible under the rules of the pertinent rules of the Vienna Convention.[13] The question that the Panel should examine in this dispute is not different from those done by the Appellate Body and the arbitrators in the previous cases—whether Australia's interpretation of Article 2.2.1.1 that is *permissible* under the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention.

IV. Whether an investigating authority may consider evidence not included in the application when initiating an investigation

14. In deciding whether to initiate a countervailing duty investigation, an investigating authority is not precluded from considering evidence other than that included in the application.

15. Pursuant to Articles 11.2 and 11.3 of the SCM Agreement, and Articles 5.2 and 5.3 of the Anti-Dumping Agreement, the legal standard applicable when initiating a countervailing duty or anti-dumping investigation is whether there is *sufficient* evidence to justify the initiation.[14] In applying this legal standard to anti-dumping investigations, the panel in *Guatemala – Cement I* pointed out that there is nothing in the Anti-Dumping Agreement that prevents an investigating authority from seeking evidence other than that included in the application.[15] Similarly, the panel in *Guatemala – Cement II* stated that "one of the consequences of th[e] difference in obligations [under Articles 5.2 and 5.3 of the Anti-Dumping Agreement] is that investigating authorities need not content themselves with the information provided in the application but *may gather information on their own* in order to meet the standard of sufficient evidence for initiation in Article 5.3."[16] Those interpretations of Articles 5.2 and 5.3 would equally apply to Articles 11.2 and 11.3 of the SCM Agreement, which contain nearly identical provisions.

16. The view that an investigating authority may consider evidence not included in the application seems also consistent with the fact that, under Article 11.6 of the SCM Agreement and Article 5.6 of the Anti-Dumping Agreement, the authority can even initiate an investigation on its own initiative, without receiving a written application by a domestic industry at all.

[13] The Appellate Body, *US – Continued Zeroing*, para. 270 (referring to the Appellate Body Report, *US – Hot Rolled Steel*, para. 60) and paras. 267, 272-273 and 317; Article 25 Arbitration Award, *Colombia – Frozen Fries*, paras. 4.14, 4.30 and 4.101.

[14] SCM Agreement, Articles 11.2, 11.3; Anti-Dumping Agreement, Articles 5.2 and 5.3.

[15] Panel Report, *Guatemala – Cement I*, para. 7.53.

[16] Panel Report, *Guatemala – Cement II*, para. 8.62. (emphasis added)

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO

1. Mexico appreciates the opportunity to express its views in this proceeding.

2. Mexico agrees with the following argument of Australia: "[a] holistic and proper interpretation of Article 2.2.1.1 [of the Anti-Dumping Agreement] must take [the term] "normally" into account",[1] and interpret it in a way that is not redundant and does not violate the principle of effectiveness. This principle is recognized by the WTO case law in several reports, including the Appellate Body report in *US – Gasoline*.[2]

3. In previous proceedings, Mexico referred to the interpretations and findings of panels and the Appellate Body according to which the obligation to calculate the costs based on the records kept by the exporters or producers, prescribed by Article 2.2.1.1 of the Anti-Dumping Agreement, is not absolute.

4. Article 2.2.1.1 of the Antidumping Agreement establishes the requirements that the records of the exporter or producer must comply with so that they can be used as the basis to calculate costs in an antidumping investigation. In this regard, we note that the text of the article raises the following two premises:

a) The first establishes that, normally, the costs will be calculated on the basis of the records kept by the exporter or producer.

b) The second establishes that the aforementioned premise, will apply as long as two conditions are met:

   i. That the records of the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and

   ii. that they reasonably reflect the costs associated with the production and sale of the investigated product.

5. In other words, if the exporter or producer's records meet the above two conditions then, the authority will normally use the exporter or producer's accounting records.

6. In Mexico's view, the term "normally", used in the first phrase of Article 2.2.1.1 of the Anti-Dumping Agreement, implies that investigating authorities are not immediately required to use the records of investigated exporters or producers, even if they comply with the two mentioned conditions, namely, that they are compatible with the accounting principles of the exporting country, and they reasonably reflect the costs associated with the production and sale of the considered product. In fact, the term "normally" suggests that the investigating authorities are empowered to analyze whether the use of the records of the investigated exporters or producers would lead to an "abnormal" or "exceptional" result, even if the two aforementioned conditions were fulfilled, as well as to approve or reject the records in accordance with the result of the analysis.

7. Therefore, Mexico considers that the conditioning term "normally" implies the existence of circumstances other than the two conditions expressly indicated in Article 2.2.1.1 of the Antidumping

[1] Australia's FWS, para. 182.

[2] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (DS2), p. 27:

> *"… One of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."*

Agreement, which permits an authority not to use of the records kept by the exporters or producers, as it is not an absolute obligation.

8. Thereby, as Australia mentions in its submission, in the *US – Clove Cigarettes* case, the Appellate Body concluded that, if an obligation is qualified by the adverb "normally", the referred obligation admits some exemptions under certain circumstances.[3]

9. The term "normally" implies that there is a presumption in favor of the accounting records of the producer or exporter to be considered for the calculation of costs as the preferred basis, but it is a rebuttable presumption. In this context, if the records meet those conditions, and the authority decides not to use them as a basis for the calculation then the consequence is that the authority would have the burden of justifying the reasoning behind that decision.

10. This interpretation is in accordance with the Appellate Body interpretation in the *EU – Biodiesel (Argentina)* case, in which it found that "[…] the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence".[4]

11. With this, we conclude our intervention, we are happy to answer any question that the Panel may have.

[3] Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (DS406), para. 273. Retrieved by the Panel in *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States* (DS427), para. 7.161.

[4] Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, para. 6.73.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. INTRODUCTION

Madam Chair, distinguished Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings.

2. Before introducing Norway's views, we would like to take this opportunity to restate Norway's stance on Russia's ongoing aggression against Ukraine.

3. Norway continues to strongly condemn Russia's egregious military attack on its neighbour Ukraine. Russia's war of aggression against Ukraine constitutes a gross violation of international law, the rules-based system which also underpins this organisation and the dispute settlement mechanism. This military aggression is also gravely hurting multilateral cooperation at a time when we need it more than ever.

4. We reiterate Norway's unwavering support for Ukraine's sovereignty and territorial integrity, within its internationally recognised borders.

5. Now turning to the present proceedings, Norway did not present a written submission to the Panel. Without taking a position on the facts of this dispute, Norway will confine its statement to comment on what we consider to be some of the key issues in the dispute. In this oral statement, Norway will therefore set out its views on the proper legal interpretation of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement (hereinafter "ADA") in regards to this dispute.

II. ARTICLE 2.2 OF THE ADA: WHEN A PARTICULAR MARKET SITUATION RENDERS THE DOMESTIC PRICES UNABLE TO PERMIT A PROPER COMPARISON

6. Article 2.1 of the ADA restates the obligation to ensure a proper comparison between the export price and the normal value, and Article 2.2 provides details on how the investigating authorities shall ensure price comparability where *domestic sales do not permit a proper comparison*.

7. Among the limited circumstances where an external benchmark should be used to ensure price comparability, Article 2.2 makes reference to situations where sales of the like product destined for consumption in the domestic market of the exporting country "do not permit a proper comparison" because of the "particular market situation".

8. Norway submits that the mere existence of a "particular market situation" does not in itself permit the investigating authority to disregard home market prices. The wording of the provision establishes a link between the particular market situation and the inability to provide a proper comparison. The term "because of" entails that the situation with sales not permitting a proper comparison must be caused by either "the particular market situation" or "the low volume of sales".

9. Reference is made to the panel's findings in *Australia – Anti-Dumping Measures on Paper* para. 7.27: "Specifically, that domestic sales 'do not permit a proper comparison' must be 'because of the particular market situation'. If domestic sales do permit a proper comparison, then they cannot be disregarded as the basis for normal value, regardless of the existence of the particular market situation and its effects, whatever those may be".

10. Moreover, the fact that the comma appears after the word "when" bundles and links the alternative criteria "particular market situation" and "low volume of sales" to the criterion of sales not permitting a proper comparison. It is clear that this criterion must be applied to situations where there is a "particular market situation" or a "low volume of sales". Otherwise, there would be no need for the provision to contain the alternative of disregarding home market prices where there are no sales at all.

11. The nexus between the particular market situation or low volume of sales respectively and the ability to permit a proper comparison is evident in the structure of the paragraph; the first phrase of the first sentence concerns situations where there are no sales and naturally there can be no "such sales" permitting a proper comparison. The second phrase is prefaced by "or", which creates a distinction from the first phrase and separates the information after the first comma. This, in turn enables application of the criterion of "do not permit a proper comparison" only to the second phrase. If this criterion was not meant to be used for both alternatives, the provision would have been drafted by each of the criteria separated by comma and using "or" before the last alternative.

12. Hence, a literal interpretation of the provision indicates that the criterion of "do not permit a proper comparison" should be applied to both alternatives under the second phrase of the sentence.

13. Norway therefore agrees with Brazil, as argued in its third party written submission,[1] that governmental actions are relevant only if they create market distortions that do not permit a proper comparison of domestic and export prices.

III. ARTICLE 2.2.1.1 OF THE ADA: THE POSSIBILITY OF REJECTING THE EXPORTER'S OR PRODUCERS'S COST OF PRODUCTION AND RESORTING TO AN EXTERNAL BENCHMARK WHEN CALCULATING NORMAL VALUE

14. Turning now to Article 2.2.1.1 of the ADA, and the detailed rules on how to establish the "cost of production" of the exporter or producer under investigation, the plain text of Article 2.2.1.1 of the ADA makes clear that the cost of production shall "normally" be based on records kept by the exporter that reasonably reflect the actual cost of production in the exporting country.

15. The ordinary meaning of the adverb "normally" suggests "[u]nder normal or ordinary conditions; ordinarily; as a rule".[2] The Appellate Body confirmed in *US – Clove Cigarettes* that "the qualification of an obligation with the adverb 'normally' … indicates that the rule … admits derogation" under conditions that are not "normal" or "ordinary".[3]

16. The panel in *Australia – Anti-Dumping Measures on Paper* clarified the relationship between "normally" and the other two conditions in the article. The panel concluded that "in relying on 'normally', the investigating authority should give meaning to the whole of the obligation in Article 2.2.1.1, first sentence, and should therefore examine whether the records satisfy the two explicit conditions and provide a satisfactory explanation as to why, nonetheless, it finds compelling reasons to disregard them".[4]

17. To give meaning to the whole of Article 2.2.1.1, it is necessary to include the obligation to justify any deviations from using the domestic market price. As laid out by the panel in *China – Broiler Products*, "the use of the term 'normally' in

[1] Brazil's written third party submission, para. 7.
[2] *The New Shorter Oxford English Dictionary*, 4th edition, L. Brown (ed.) (Oxford University Press, 1993), Vol. 2, p. 1940.
[3] Appellate Body Report, *US – Clove Cigarettes*, para. 273.
[4] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.117

Article 2.2.1.1 means that an investigating authority is bound to explain why it departed from the norm and declined to use a respondent's books and records".[5]

18. As stated by the Appellate Body in *US – Anti Dumping and Countervailing Duties (China)* the "investigating authority may reject in-country private prices if it reaches the conclusion that *these* are too distorted due to the predominant participation of the government as a supplier in the market".[6] The determination to reject the actual costs of the producer must be specific to the exporter or producer in question, and to the cost factors in question, and based on positive evidence together with a reasoned explanation of the compelling reasons for the rejection.

19. Investigating authorities should, consequently, be mindful that it is not sufficient to determine that the government has a substantial presence in a given market to authorise resort to an out-of-country benchmark. It is *also necessary* to determine that the said presence distorts prices for inputs through the chain of production in such a compelling way that all domestic prices available for comparison would not properly reflect prevailing market conditions.

IV. CONCLUSION

20. Norway respectfully requests the Panel to take account of the considerations laid out in this statement when evaluating the claims set forth in this dispute.

21. Madam Chair, distinguished Members of the Panel, this concludes Norway's statement today. Thank you for your attention.

[5] Panel Report, *China Broiler Products*, para. 7.161

[6] Appellate Body Report, *US – Anti Dumping and Countervailing Duties (China),* paras. 446-447. Emphasis added.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

I. Introduction

1. The Russian Federation exercises its right to participate in these proceedings as a third party because of its systemic interest in the correct and consistent interpretation and application of the covered agreements, in particular *the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (hereinafter "the Anti-Dumping Agreement") and *the Agreement on Subsidies and Countervailing Measures* (hereinafter "the SCM Agreement"). Whilst not taking a final position on the specific facts of this case, the Russian Federation will provide its views on the legal claims and arguments advanced by the parties to the dispute, to the extent they concern the interpretation of Articles 2.2, 2.2.1.1 and 2.2.1 of the Anti-Dumping Agreement and Article 14(d) of the SCM Agreement.

II. Proper interpretation of Articles 2.2, 2.2.1.1 and 2.2.1 of the Anti-Dumping Agreement

2. To start with, the Russian Federation concurs with China that interpretation of any treaty provision is to be conducted "in accordance with the general rule of interpretation set out in Article 31 of the Vienna Convention […] reinforced by Article 3.2 of the Dispute Settlement Understanding". The words actually used provide the basis for an interpretation that must give meaning and effect to all its terms.[1] Importantly, "provisions of the Anti-Dumping Agreement are explicit regarding the permissibility of disregarding certain matters."[2] Thus, the starting point in treaty interpretation is the text of the relevant treaty provision. In this regard, Article 17.6(ii) of the Anti-Dumping Agreement does not provide an excuse to deviate from the rules, as a permissible interpretation in the sense of Article 17.6(ii) of the Anti-Dumping Agreement may be only the one that "is found to be appropriate **after** application of the pertinent rules of the Vienna Convention".

Article 2.2.1.1 of the Anti-Dumping Agreement

3. The Russian Federation submits that Australia's position that the circumstances of the underlying investigations "were not normal or ordinary" within the meaning of Article 2.2.1.1 of the Anti-Dumping Agreement[3], as well as understanding under these circumstances "government intervention" in domestic steel and steel input market[4] stem from the legally flawed thesis. This Australia's reliance on Article 2.2.1.1 of the Anti-Dumping Agreement has no legal value and must be rejected by the Panel for the reasons set forth below.

4. **First**, as a starting point it should be stressed that dumping is "the result of the pricing behaviour of individual exporters or foreign producers".[5] From this follows the only true conclusion that it is the way the investigated exporters (producers) establish the prices for their products which must be taken into account when determining dumping. Dumping cannot be established based on the factors that are beyond the control of the investigated producer or exporter. Otherwise, the letter and spirit of the Anti-Dumping Agreement will be made null and void.

5. **Second**. the term "reasonably" in Article 2.2.1.1 qualifies "the reproduction or correspondence of the costs".[6] The words "reasonably reflect" refer to "such records".[7] Taking into account the structure of Article 2.2.1.1 of the Anti-Dumping Agreement, and that the words

[1] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 17.
[2] Appellate Body Report, *US – Continued Zeroing*, para. 286.
[3] See, *inter alia*, Australia's FWS, paras. 5, 155, 179, 191-192, 198.
[4] See, *inter alia*, Australia's FWS, paras. 6-7, 179, 209, 218-219.
[5] Appellate Body Report, *EU – Biodiesel (Argentina)*, fn. 130 (referring to Appellate Body Reports, *US – Zeroing (Japan)*, paras. 111 and 156; *US – Zeroing (EC)*, para. 129; and *US – Stainless Steel (Mexico)*, para. 95 and fn. 208 to para. 94).
[6] Ibid.
[7] Ibid.

"reasonably reflect" precede the words "costs associated with the production and sale of the product under consideration", "it is clear that it is the 'records' of the individual exporters or producers under investigation that are subject to the condition to 'reasonably reflect' the 'costs'".[8] Therefore, the second condition of the first sentence of Article 2.2.1.1 requires examination of "whether the *records* kept by the exporter or producer *suitably and sufficiently correspond* to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".[9]

6. From all this it clearly follows that "there is no additional or abstract standard of 'reasonableness' that governs the meaning of 'costs' in the second condition in the first sentence of Article 2.2.1.1".[10] The Appellate Body in *Ukraine – Ammonium Nitrate (Russia)* confirmed that "the examination under the second condition in the first sentence of Article 2.2.1.1 is not one that pertains to whether the costs contained in the records are not reasonable because, for instance, they are lower than those in other countries".[11] Article 2.2.1.1 of the Anti-Dumping Agreement concerns with the quality of records of "the exporter or producer under investigation" and the proper allocation of costs, and not with the government regulation. This provision does not permit any analysis related to "competitive market costs" or "government regulation".

7. In violation of applicable WTO rules Australian investigating authorities simply imported into the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement additional inquiries as to whether the records contain the so called "competitive market costs".[12] Such an inquiry is contrary to Article 2.2.1.1 of the Anti-Dumping Agreement. The first sentence of Article 2.2.1.1 does not contain such words and phrases as "competitive", "market", "government" or "effect". There are also no words in the text of the Anti-Dumping Agreement suggested by some third parties such as: "governmental actions" ; "**a** normal value"; "normal operation of the market forces of supply and demand"; "**a** particular market situation"; "distorted and unreliable" data ; "normal commercial practice"; "normal commercial conditions"; "would-be market price of the final product"; "well-functioning market"; "government regulation"; "third-country input prices"; "abnormal conditions"; "government interference"; "normal commercial principles"; "commercial conception of costs"; "economically meaningful data". In the absence of the textual support for such inquiries, a treaty interpreter must not import into a treaty and its provisions concepts that were not intended,[13] and other words which are not there.

8. The first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement contains the rule for the calculation of the cost of production and sale of the specific product under consideration. The first sentence of Article 2.2.1.1 stipulates that "costs shall normally" be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records meet two conditions: (i) they are in accordance with the generally accepted accounting principles of the exporting country and (ii) they reasonably reflect the costs associated with the production and sale of the product under consideration.

9. Accordingly, when both conditions of the first sentence of Article 2.2.1.1 are met, as a general and legally binding rule, an investigating authority **must** calculate the cost of production and sale of specific product under consideration based on the records kept by investigated producer (exporter). This is the only permissible interpretation of the first sentence of Article 2.2.1.1 within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement.

Meaning of the term "normally"

10. The Russian Federation notes Australia's position that there is an open list of circumstances under the term "normally" in Article 2.2.1.1 of the Anti-Dumping Agreement permitting an investigating authority to reject the correctly recorded costs.[14] In particular, Australia alleges that

[8] Ibid.
[9] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.26. (emphasis added).
[10] Appellate Body Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 6.102 (referring to. Appellate Body Report, *EU – Biodiesel (Argentina),* para. 6.37 and 6.56).
[11] Appellate Body Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 6.102.
[12] See, for example, China's FWS, paras. 76, 162-163, 167, 178-180.
[13] Appellate Body Report, *India – Patents (US)*, para. 45.
[14] See, for example, Australia's FWS, paras. 180, 189.

"Article 2.2.1.1 expressly authorises an investigating authority to depart from an exporter's records in *circumstances which are not 'normal'*".[15] This position is legally flawed.

11. **First**, the dictionary meaning of the adverb "normally" is "[i]n a regular manner; regularly; [u]nder normal or ordinary conditions; as a rule".[16] The auxiliary verb "shall" indicates that this provision is of mandatory character as the word "'shall" is commonly used in legal texts to express a mandatory rule".[17] Thus, according to the general rule set forth in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, the costs of production and sale of the product under consideration shall be calculated on the basis of records kept by the investigated producers and exporters provided that these records meet the two conditions of the first sentence.

12. **Second**, the immediate context of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement exclusively touches upon accounting and reporting practices which may make it difficult for an investigating authority to ascertain all costs actually incurred by the investigated producers and exporters of the specific product under consideration. This once again emphasizes that Article 2.2.1.1 of the Anti-Dumping Agreement is focused *on accounting and reporting practices* of actual costs of production of the specific product under consideration.[18]

13. **Third**, the Anti-Dumping Agreement addresses pricing behavior of foreign exporters or producers, which is a different situation from the one addressed by the SCM Agreement (conferring benefit to the recipient by government).[19] Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement support this understanding.

14. **Fourth**, neither Article 2, nor other provisions of the Anti-Dumping Agreement mention the term "input" or "input prices". According to Article 2.1 *a product* is being dumped when it is "introduced into the commerce of another country" at an export price that is "less than its normal value". There is **no** textual support in the Anti-Dumping Agreement for the assessment of prices for inputs in determination of the normal value.

15. **Fifth**, Article 2.2 of the Anti-Dumping Agreement provides mandatory rule for constructing the normal value on the basis of the cost of production of the like product in the country of origin. Article 2.2 of the Anti-Dumping Agreement does **not** provide for any possibility to construct the normal value based on the out-of-the-country data. Just the opposite – there is mandatory obligation to construct the normal value on the basis of **the cost of production in the country of origin** as is.

16. **Sixth**, contrary to certain views expressed in this proceeding, the existence of "**the** particular market situation" does **not** give carte blanche to investigating authorities. Even in cases when sales do not permit a proper comparison because of the particular market situation and an investigating authority resorts to the second alternative method to construct the normal value, the latter **shall** be based on the cost of production in the country of origin. There is no way to reject costs in the country of origin and substitute them with prices outside the country of origin in constructing the normal value.

17. **Seventh**, it is appropriate to recall that "provisions of the Anti-Dumping Agreement are **explicit** regarding the permissibility of disregarding certain matters".[20] Only limited number of explicit provisions, such as the second Ad Note to Article VI:1 of the GATT 1994 (which is incorporated by reference into the Anti-Dumping Agreement through Article 2.7 thereof), can provide the legal basis for an investigating authority to use prices or costs other than those in the country of origin of the product under consideration. Such provisions suggest "that their drafters considered

[15] Australia's FWS, para. 180. (emphasis added)
[16] Oxford English Dictionary, entry for the word "normally", accessed January 25, 2023, https://www.oed.com/view/Entry/128277?redirectedFrom=normally#eid..
[17] Appellate Body Report, *EC – Fasteners (China)*, para. 316.
[18] See Panel Report, *EC – Salmon (Norway)*, para. 7.483.
[19] See Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 568.
[20] Appellate Body Report, *US – Continued Zeroing*, para. 286 (referring to the Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 103).

explicit derogations to be needed in order to allow investigating authorities to use prices or costs other than those prevailing in the country of origin".[21]

Articles 2.2.1.1 and 2.2.1 of the Anti-Dumping Agreement

18. The Russian Federation agrees with China that "Article 2.2.1.1 is relevant in relation to the OCOT determination under Article 2.2.1, in that Article 2.2.1.1 contains the specific requirements with respect to the determination of cost "*[f]or the purpose of paragraph 2*", to which Article 2.2.1 belongs".[22] The introductory phrase in Article 2.2.1.1 states that it applies to "[p]aragraph 2" which covers, *inter alia*, Article 2.2.1 of the Anti-Dumping Agreement, and thus these provisions are related. In *EU – Biodiesel (Argentina)* the Appellate Body explained that Articles 2.2.1 and 2.2.1.1 are connected as they "elaborate on various aspects of Article 2.2" of the Anti-Dumping Agreement.[23] The panel in *EC – Salmon (Norway)* recognized that the rules for calculating the costs used in a determination under Article 2.2.1 are found in Article 2.2.1.1.[24] In *Ukraine – Ammonium Nitrate (Russia)*, on the basis of the text of these provisions, the panel held that "costs used in the ordinary-course-of-trade test under Article 2.2.1 must be consistent with Article 2.2.1.1".[25] Otherwise, it is "likely to create systemic problems as in conducting their ordinary-course-of-trade test under Article 2.2.1.1 investigating authorities would be free to use a cost of production calculated inconsistently with Article 2.2.1.1, thereby frustrating the very purpose of this test".[26] Therefore, Australia's ordinary-course of trade determination to the extent it relied on costs calculated inconsistently with Article 2.2.1.1 breached its obligations under Article 2.2.1 of the Anti-Dumping Agreement.

Article 2.2 of the Anti-Dumping Agreement

19. Article 2.2 of the Anti-Dumping Agreement explicitly requires, *inter alia*, to construct the normal value on the basis of "the cost of production in the country of origin". The obligation in Article 2.2 of the Anti-Dumping Agreement is of a mandatory nature because it uses the word "shall" which is "commonly used in legal texts to express a mandatory rule".[27]

20. Hence, Article 2.2 of the Anti-Dumping Agreement expressly requires the cost of production both to be assessed on the basis of, and to be based on, the costs that exist in the country where the investigated exporter or producer produces the product under consideration. There is no possibility to interpret the phrase "the cost of production in the country of origin" in a way that would allow an authority to substitute the production costs in the country of origin with the extraneous prices/costs/data obtained from third countries that are not the costs of production in the country of origin.

21. The Russian Federation agrees with China that there is a hierarchical relationship between Article 2.2 and its subparagraphs, and the clear discipline of Article 2.2.[28] The hierarchical relationship is expressed in the fact that "even where an investigating authority is justified in not calculating production costs on the basis of the exporter's or producer's records under the first sentence of Article 2.2.1.1, it remains subject to the disciplines set out in Article 2.2, including its relevant subparagraphs, regarding the construction of normal value".[29]

Conclusions

22. Therefore, Articles 2.2.1.1, 2.2.1 and 2.2 of the Anti-Dumping Agreement prescribe an obligation for the investigating authority to calculate costs based on the costs associated with production and sale of the product under consideration in the country of origin. Thus, Australian

[21] Panel Report, *EU – Biodiesel*, para. 7.241.
[22] China's FWS, para. 126.
[23] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.14.
[24] Panel Report, *EC – Salmon (Norway)*, para. 7.252; Panel Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 7.116.
[25] Panel Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 7.116.
[26] Ibid. (emphasis added)
[27] Appellate Body Report, *EC – Fasteners (China)*, para. 316.
[28] China's FWS, para. 100.
[29] Appellate Body Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 6.89. (emphasis added)

investigating authorities acted inconsistently with obligations under Articles 2.2, 2.2.1.1 and 2.2.1 of the Anti-Dumping Agreement.

III. Proper interpretation of Article 14(d) of the SCM Agreement

23. The Russian Federation submits that deviation from in-country prices as a primary benchmark for the calculation of a benefit from provision of goods "made for less than adequate remuneration" under Article 14(d) of the SCM Agreement is possible in strictly limited circumstances and must meet very high evidentiary threshold. Such a recourse to an alternative benchmark must be made only **after** the investigating authority has established that, first, in-country prices are distorted as a result of the government intervention and, second, distortion is so significant that the prices cannot reflect the prevailing market conditions. More specifically, before proceeding to use the alternative benchmark, the investigating authority must establish that the government's role is so predominant that it effectively determines the price of the goods in question".[30] Establishing plain presence of government intervention, as well as mere likelihood of the distortion, would not suffice. To interpret Article 14(d) of the SCM Agreement as proposed by Australia would amount to a manifest lowering of this standard. Therefore, allegations by Australia with respect to Article 14(d) of the SCM Agreement are unfounded and must be rejected in their totality.

[30] Appellate Body Report, *US - Countervailing Measures (China) (Article 21.5 – China)*, para. 5.147.

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED KINGDOM

I. INTRODUCTION

1. The United Kingdom welcomes the opportunity to participate as a third party in this dispute. During the course of the proceedings, the United Kingdom provided the Panel with its views on the legal interpretation of certain provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement").

2. Fundamentally, the United Kingdom's position is that the term "normally" in Article 2.2.1.1 of the Anti-Dumping Agreement provides flexibility to an investigating authority to, in certain circumstances, not use costs in records kept by a producer or exporter under investigation when constructing normal value. Logically, it must follow that, having been permitted to not use those costs under Article 2.2.1.1, an investigating authority is then permitted to use out of country information in order to calculate the cost of production under Article 2.2.

II. THE TERM "NORMALLY" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

3. Article 2.2 of the Anti-Dumping Agreement allows an investigating authority to construct normal value on the basis of "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits". Article 2.2.1.1 provides that, when doing so, the "cost of production" shall "normally" be calculated on the basis of records kept by the producer or exporter, provided that two conditions are met. These conditions are that such records (1) "are in accordance with the generally accepted accounting principles of the exporting country" and (2) "reasonably reflect the costs associated with the production and sale of the product".

4. The United Kingdom considers that the ordinary meaning of the term "normally" in Article 2.2.1.1, understood in light of its context, and in light of the object and purpose of the Anti-Dumping Agreement, does not require an investigating authority to calculate costs on the basis of records kept by a producer or exporter in all cases, even where the two conditions in that provision are met.

5. The ordinary meaning of the term "normally" is "under normal or ordinary conditions".[1] The effect of the phrase "provided that" in the same sentence is that, where the two conditions (which follow that phrase) are satisfied, costs should "normally" be calculated on the basis of records kept by the exporter or producer under investigation. Even if the two conditions are satisfied, however, the term "normally" provides flexibility to deviate from this methodology if conditions are not normal or ordinary.

6. The context of the Anti-Dumping Agreement lends further support to this interpretation. The Anti-Dumping Agreement contains five provisions that use the phrase "provided that" and an obligation introduced by the verb "shall".[2] Only two of these five provisions also contain the term "normally";[3] this indicates the term was deliberately included to add meaning.[4]

7. Finally, the object and purpose of Article 2 of the Anti-Dumping Agreement supports this interpretation. The purpose of constructing normal value is to establish that value "through an *appropriate proxy* for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement

[1] Oxford English Dictionary definition of "normally, adv.", available at https://www.oed.com/view/Entry/128277, accessed 28 March 2023.
[2] Article 2.2, Article 2.2.1.1 (first sentence), Article 2.2.1.1 (second sentence), Article 9.5 and footnote 2 of the Anti-Dumping Agreement.
[3] Article 2.2.1.1 (first sentence), and footnote 2 of the Anti-Dumping Agreement.
[4] See Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.115.

must be capable of generating such a proxy".[5] The need for costs to be an *appropriate* proxy supports the interpretation that "normally" permits a Member not to use costs when doing so would not yield an appropriate proxy.

8. This interpretation is consistent with previous panel and Appellate Body reports. The Appellate Body has stated that "given the reference to 'normally' in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances, other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply".[6]

9. If no such flexibility existed, then "normally" would be otiose. Such an interpretation would be contrary to the principle of effectiveness in treaty law. The Appellate Body has recognised that it is an important aspect of the general rule of interpretation under the Vienna Convention that "interpretation must give meaning and effect to all the terms of a treaty".[7]

10. The United Kingdom agrees with Australia that a substantial proportion of suppliers selling at below cost-recovery rates is an example of when a market does not operate under normal or ordinary conditions.[8] Several provisions of the Anti-Dumping Agreement are predicated on the assumption that all private companies set out to make a profit. For example, Article 2.2 explicitly requires an investigating authority to add a "reasonable amount … for profits" alongside other relevant costs. Similarly, in Article 2.2.1, where sales are made at a price below the cost of producing that product (i.e. there is a negative profit margin), such sales "may be treated as not being in the ordinary course of trade" where those sales are made over an extended period of time, in substantial quantities and where the price does not provide for cost recovery within a reasonable period of time. The United Kingdom therefore submits that a market dominated by loss-making firms does not operate under conditions that can be considered normal or ordinary.

III. CALCULATING NORMAL VALUE USING THE "COST OF PRODUCTION IN THE COUNTRY OF ORIGIN" UNDER ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

11. Article 2.2 of the Anti-Dumping Agreement requires that, where an investigating authority constructs normal value based on costs of production plus administrative, selling and general costs and profits, it must use the "cost of production in the country of origin". The United Kingdom submits that where an investigating authority has established that the circumstances in the relevant market are not normal or ordinary, and it is therefore not appropriate to use the records of the exporter or producer, it follows that it is not required to use those same costs when constructing normal value pursuant to Article 2.2.

12. Nothing in the text of Article 2.2 of the Anti-Dumping Agreement precludes an investigating authority from relying on out-of-country information in constructing normal value. Article 2.2 should also be read in light of the context provided by Article 2.2.1.1. While Article 2.2.1.1 establishes records kept by a producer or exporter as the preferred source of production data, it does not preclude the use of other data.[9] It expressly provides that two conditions must be met before requiring an investigating authority to "normally" calculate costs of production "on the basis of records kept by the exporter or producer under investigation". In addition, as the United Kingdom argues above, the term "normally" establishes that even where these two conditions in the first sentence of Article 2.2.1.1 are met, an investigating authority may nevertheless reject exporters' recorded costs; that is, where the circumstances are not normal or ordinary.

13. Article 2.2 requires that the costs used reflect the cost of production in the "country of origin". This means that adjustments may be needed to out-of-country data to ensure that "country of origin" costs are represented accurately. Which specific adjustments are required will vary from case to case depending on factual circumstances relating to the product concerned, the particular

[5] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24 (emphasis added). See also Panel Reports, *EU – Biodiesel (Argentina)*, para. 7.233; *Thailand – H-Beams*, para. 7.112; *US – Softwood Lumber V*, para. 7.278.

[6] Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.105. See also Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.115.

[7] Appellate Body Report, *US – Gasoline*, p. 23.

[8] Australia's first written submission, para. 201.

[9] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70-6.71.

exporters or producers in question, and other relevant circumstances. While the investigating authority is required to make adjustments to out-of-country costs in order to make them representative of costs in the country of origin, it is not required to apply to the out-of-country costs the very same conditions that made the exporter recorded costs not normal or ordinary.

14. Reading Article 2.2 alongside Article 2.2.1.1, and, particularly the term "normally" in the latter, indicates that the necessary adjustments to out-of-country data need to make that data representative of the costs of production in the country of origin, were the conditions in that country to be normal and ordinary. This is the only harmonious interpretation of Articles 2.2 and 2.2.1.1. Otherwise, the investigating authority would be allowed to reject exporters' recorded costs where conditions are not normal or ordinary, but must apply those very same abnormal conditions to the replacement costs. The result would be an inappropriate normal value based on reported costs which do not reflect normal and ordinary conditions.

15. This interpretation is also supported by the object and purpose of Article 2.2. The core purpose of Article 2.2 is to ensure that the "normal value" to which the export price is compared is such as to allow a proper comparison between these two values. In order to allow a proper comparison, the "normal value" must be just that: "normal". A value which is either based on unreliable or distorted information, or information that is made unreliable or distorted by inappropriate adjustments, would not be "normal" and would not enable a proper comparison. This would defeat the core purpose of Article 2.2.

ANNEX C-9

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. Article 17.6(ii) of the AD Agreement

1. As Australia noted in its first written submission, Article 17.6(ii) governs where a provision has more than one "permissible" interpretation. At the end of the Uruguay Round negotiations, Article 17.6(ii) was key to the acceptance of the other provisions of the AD Agreement. The existence of such a provision confirms that Members were aware that the text of the AD Agreement could pose particular interpretive challenges, at least in part because it was drafted to cover varying and complex anti-dumping regimes and long-standing differences concerning methodology. WTO Members agreed, therefore, that it would be a legal error not to respect a permissible interpretation of the AD Agreement.

2. The question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is a permissible interpretation. As the United States has explained for years, "permissible" means just that: a meaning that could be reached under the Vienna Convention. Article 17.6(ii) itself confirms that provisions of the AD Agreement may "admit[] of more than one permissible interpretation." If that is the case and the investigating authority has relied upon one such interpretation, a panel must find the measure to be in conformity with the AD Agreement. As one panel report stated, "[I]n accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it."

3. The recent award by the arbitrators in *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands* (DS591), provides an exemplar. The arbitrators in that dispute seriously engaged with the text of Article 17.6(ii) and appropriately recognized that the subparagraphs of Article 17.6 "must be understood in a manner granting special deference to investigating authorities under the Anti-Dumping Agreement." That analysis addressed directly the nature of treaty interpretation under the Vienna Convention and explained that a proper "approach assumes, as the second sentence does, that different treaty interpreters applying the same tools of the Vienna Convention may, in good faith and with solid arguments in support, reach different conclusions on the 'correct' interpretation of a treaty provision." The arbitrators in that dispute went on to note favorably the observation that the Vienna Convention rules "are facilitative not disciplinary and do not 'instruct the treaty interpreter to find a single meaning of the treaty' as a former Appellate Body member has written."

4. The ordinary meaning of "permissible" is "allowable" or "permitted" – that is, an interpretation that could be reached under customary rules of interpretation. Thus, the Panel's task under Article 17.6(ii) is to determine whether Australia's investigating authority relied upon an interpretation that could be reached under customary rules of interpretation – and not whether Australia's interpretation is the same as the one the Panel might reach first. With this standard in mind, Australia's first written submission demonstrates that the interpretations underlying the challenged AD and CVD determinations, at a minimum, satisfied that Article 17.6(ii) standard. For example, as explained in the U.S. third-party submission and elaborated today, Australia's investigating authority employed an interpretation of Articles 2.2 and 2.2.1.1 of the AD Agreement that is based on the text of those provisions, and under the customary rules of interpretation reflects a permissible interpretation.

II. Claims Concerning the AD Agreement

5. To begin with, the text of the Article 2.2 of the AD Agreement provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

6. Notably, Article 2.2 of the AD Agreement specifies that alternatives to domestic market prices may be used to find normal value when, because of a "particular market situation" or a "low volume of ... sales in the domestic market of the exporting country," the domestic prices "do not permit a proper comparison." Article 2.2 prescribes two alternative data sources that may provide for a "proper comparison" whenever domestic market sales price data cannot be used to calculate normal value: (1) "a comparable price" for the like product when exported to an "appropriate" third country, provided the price is representative; or (2) the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits. A key phrase in Article 2.2 is "proper comparison," and the placement of this phrase in Article 2.2 reinforces that normal value must be based on prices (or costs) that "permit a *proper comparison*." To understand what a "proper comparison" entails, it is important to understand the framework of Article VI:1 of the GATT 1994, which establishes the framework for Article 2 of the Anti-Dumping Agreement.

7. Understood correctly, Article VI:1 of the GATT 1994 establishes that the dumping comparison requires comparable prices or costs. Article VI:1(a) establishes that dumping occurs when the price of an exported product "is less than the *comparable* price*, in the ordinary course of trade*, for the like product" in the home market. This suggests that "determining price comparability" under Article VI:1 refers first to determining whether there *is* such a "comparable price, in the ordinary course of trade." Without a "comparable price, in the ordinary course of trade," or suitable proxy, no dumping comparison can be made. This applies to domestic prices, third-country export prices, and costs of production (which include prices between input suppliers and the exporter or producer under investigation).

8. The AD Agreement is, as its title suggests, an agreement on the application of Article VI of the GATT 1994 and, through Article 2, implements the principle of comparability set forth in Article VI:1. For example, Article 2.1 of the AD Agreement establishes that "a product is to be considered as being dumped, *i.e*. introduced into the commerce of another country at less than its normal value, if the export price of the product being exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." This text is nearly identical to Article VI:1 (specifically, the second sentence and subparagraph (a)). Article 2.1 thus retains the key elements from Article VI:1 for domestic prices or costs to be used to calculate normal value. Specifically, there must be a "comparable price, in the ordinary course of trade".

9. Thus, contrary to China's position, the text of Article 2.2 does not require that normal value be constructed using the cost of production in the country of origin. To the contrary, the "proper comparison" text of Article 2.2 of the AD Agreement reflects that establishing normal value requires a "comparable price, in the ordinary course of trade," and cannot be interpreted as preventing an investigating authority from evaluating evidence that government interference affects the "proper comparison" of prices or costs. Several examples from prior disputes also reflect that domestic price, third-country export price, and cost of production may be considered *not* "a comparable price, in the ordinary course of trade," when the evidence of record indicates they do not reflect normal commercial principles: a price for a sale may not reflect the criteria of the marketplace; a price for a sale might not reflect normal commercial practices, such as in relation to other terms and conditions of sale; a price for a sale might be one established between related parties, rather than a transaction between economically independent entities at market prices, and thus not reflect normal commercial principles; or a price for the sale of an input used in the production of the product under consideration may not be consistent with an arm's-length transaction price or reflect normal commercial principles.

10. The above examples indicate that where normal commercial conditions do not prevail in the marketplace, prices may not be "comparable". In these instances, Article 2.2 does not prohibit the use of out-of-country information to evaluate recorded costs, or to adjust or replace recorded costs, when formulating the appropriate cost for an individual producer. Indeed, prior DSB reports have come to similar conclusions, and have not excluded the possibility that an investigating authority may use information and evidence outside the country of origin to determine the prices in the country of origin. Accordingly, the text of Article 2.2 does not preclude an investigating authority from looking to sources outside the country of origin for information or evidence about costs associated with the production of the product under consideration. The text likewise does not preclude the investigating authority from using such information or evidence to determine an exporter's or producer's cost of production in the country of origin. That the ADC evaluated sources outside China concerning the

costs associated with the production of the products under consideration is not inconsistent with Article 2.2 of the AD Agreement.

11. The United States agrees with Australia that the adverb "normally" must be understood in a manner that does not render it "inutile and redundant." Specifically, the adverb "normally" immediately follows the verb "shall" in the Article 2.2.1.1 phrase "costs shall normally be calculated." In the context of a treaty provision, the verb "shall" is understood to indicate a mandatory obligation or commitment. The adverb "normally" is generally defined as "[i]n a regular manner; … [u]nder normal or ordinary conditions; as a rule, ordinarily." As such, the adverb "normally" moderates the obligation established in the first sentence of Article 2.2.1.1, because while "normally" confirms that "under normal or ordinary conditions" costs should be calculated on the basis of the records kept by the exporter or producer under investigation," it also directs that where conditions are demonstrated to be *not* normal or *not* ordinary, costs need *not* be calculated on the basis of these records.

12. By contrast, an interpretation that "normally" only refers to the two conditions in the first sentence of Article 2.2.1.1 would render the adverb inutile and redundant. Together, the verb "shall" and the conjunction "provided that" sufficiently reference the two conditions in the first sentence of Article 2.2.1.1. Consistent with the principle of effectiveness, it is redundant for the adverb "normally" to do so as well. It is clear that the presence of the adverb "normally" instills a degree of flexibility to the first sentence of Article 2.2.1.1 and expressly contemplates that there will be instances when the evidence demonstrates that an investigating authority should *not* calculate costs on the basis of the records kept by the exporter or producer, even when these records satisfy the two conditions that follow the conjunction "provided that." If an investigating authority pursuant to Article 2.2.1.1 decided not to use a respondent's books and records, it would need to "explain why it departed from the norm" and "justify its decision on the record of the investigation and/or in the published determinations." In this case, Australia has highlighted where in its determination the ADC explained its departure from the norm. China has offered no argument as to how that explanation and supporting record evidence failed to explain the ADC's departure, or how it breached the "normally" condition of the first sentence of Article 2.2.1.1. In addition, the United States disagrees with China's interpretation of the second condition in the first sentence of Article 2.2.1.1 of the AD Agreement.

13. "For the purpose of paragraph 2" indicates that Article 2.2.1.1 should be read together with Article 2.2. The costs calculated under Article 2.2 must be capable of generating "an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales." Given that the costs under Article 2.2.1.1 must be capable of generating an appropriate proxy to allow for a proper comparison, "cost" refers to costs that reflect normal commercial principles associated with producing the product in the exporting country and not simply the "cost" reflected, for example, in an invoice price. That the costs are "*associated with* the production and sale of the product under consideration" also supports a commercial conception of costs, because the term "associated with" suggests a substantive connection between real economic costs and the production or sale of the product under consideration. To suggest otherwise would oblige investigating authorities to accept, for example, artificial transfer prices between related parties – amounts that have no economic meaning. Given that Article 6 addresses the examination of the records of an investigated firm, it would be superfluous to read Article 2.2.1.1 as addressing the same issue. Article 6.6 provides that investigating authorities "shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." Article 6.7 provides investigating authorities with the ability to "verify information provided or to obtain further details … [by] carry[ing] out investigations in the territory of other Members as required." Article 6.8 provides that the absence of necessary information, which assuredly includes accurate and actual data, may leave investigating authorities to make a determination "on the basis of facts available." Since Article 6 provides for the examination of the costs reported in the records kept by an investigated firm, interpreting the second condition of Article 2.2.1.1 as also requiring an investigating authority to accept a reported cost just because it matches such records reduces this condition to redundancy or inutility.

14. In sum, Article 2.2.1.1 of the AD Agreement, properly interpreted, does not mean that the costs reported in the records kept by the exporter or producer under investigation must always be used absent any consideration. To the contrary, an investigating authority may examine such records. That examination may include, *inter alia*, a consideration of whether the costs kept by the exporter or producer under investigation do not "reasonably reflect" real, economically meaningful

data associated with the production and sale of the product under consideration. In such a situation, an unbiased and objective investigating authority would have a basis under the AD Agreement to reject or adjust a cost that does not reflect normal commercial principles, so long as its determination was based on a reasoned and adequate explanation.

15. A non-arm's-length sale illustrates one type of transaction where an investigating authority may look beyond the four corners of a respondent's records and determine whether the transaction does not "reasonably reflect" all costs incurred in respect of the production and sale of the product, because the reported price may fail to accurately and reliably reflect the interaction between independent buyers and sellers. The authority under Article 2.2.1.1 to reject a non-arm's-length transaction from a respondent's records thus makes clear that "costs" that are "associated with" the production and sale of a product must be understood as costs that "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration."

16. Similar to a non-arm's-length sale, State interference by an exporting Member in the marketplace may generate records that do not reasonably reflect costs associated with the production and sale of the product under consideration within the meaning of the second condition of Article 2.2.1.1. When the normal value cannot be determined on the basis of domestic sales, the costs calculated under Article 2.2.1.1 must be capable of generating an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country. Like the situation in which parties to a transaction are related, where a State intervenes in the marketplace to interfere with the ability of buyers and sellers to enter into transactions according to their own commercial interests, "there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace". The context provided by other provisions in Article 2.2 also undermines China's suggested interpretation. Where the AD Agreement refers to costs "actually incurred by producers," it does so explicitly. For administrative, selling, and general costs, Article 2.2.2(i) references "the actual amounts incurred and realized by the exporter or producer in question." Similarly, Article 2.2.2(ii) uses an express limitation to "the actual amounts incurred and realized by other exporters or producers." Given the express language in Articles 2.2.2(i) and 2.2.2(ii), Article 2.2.1.1 cannot be read to limit "costs" to those actually incurred in the way envisioned by China.

17. For the above reasons, the focus of the Panel's inquiry in this matter should be on whether Australia's findings for rejecting input costs, based on the facts and circumstances of its investigation, is one that could have been reached by an objective and unbiased investigating authority. An investigating authority may examine whether a respondent's recorded costs "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration." It would be incongruous to consider that Australia was prohibited from examining whether those same steel costs reasonably reflect the costs associated with the production and sale of the product under consideration for purposes of constructing normal value under Article 2.2.1.1.

18. The United States notes that China's erroneous interpretation of Article 2 contradicts the practice of its own investigating authority. In its antidumping practice, it has resorted to out-of-country cost information to establish normal value. It has done so without regard to the exporting respondents' reported price and cost information in the exporting country, and on the basis of purported government intervention in the exporting country. That China's positions before the Panel conflict with the practice of its investigating authority underscores that those positions are not consistent with the text of Articles 2.2 or 2.2.1.1.

III. Claims Concerning the SCM Agreement

19. From Australia's request for a preliminary ruling, the United States understands China's claims to concern CVD measures on stainless steel sinks that terminated before the Panel was established, and that therefore are outside the Panel's terms of reference. For completeness, the United States will also briefly comment on China's claims regarding Article 2.1(c) and 14(d) of the SCM Agreement, which rely upon incorrect interpretations of those provisions.

20. Article 14(d) of the SCM Agreement reflects that an investigating authority has scope in selecting an appropriate benchmark to consider the particular circumstances presented in an

investigation. Although an investigating authority should first consider proposed in-country prices for the good in question, it would not be appropriate to rely on such prices if, as a result of government intervention in the market, they are not market-determined. Government intervention may distort in-country prices in a variety of ways – e.g., by administratively setting the price, through the government's participation as a buyer or seller, or where the government is the predominant supplier of a good. In this regard, it is not surprising that an investigating authority might rely on out-of-country benchmarks to calculate the benefit from inputs provided by the Government of China for less than adequate remuneration. The reliability of Chinese in-country prices was of sufficient concern to Members that China's Accession Protocol recognizes that such prices within China might not always be appropriate benchmarks. Specifically, Article 15(b) states, "if there are special difficulties in [applying the relevant provisions of the SCM Agreement], the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks." The text of Article 14(d) contradicts China's position that the ADC was not permitted, in evaluating the extent of benefit, from comparing Chinese prices to an appropriate out-of-country benchmark.

21. China's argument that the ADC was required to identify a formal "subsidy program" implemented through a plan or scheme is not supported by the text of Article 2.1 of the SCM Agreement. Specifically, nothing in the text of Article 2.1(c) requires an investigating authority to identify a "subsidy program" that is formally set out in a plan or scheme. Article 2.1(c) provides that one of the "factors" that "may be considered" as part of *de facto* specificity analysis is "use of a subsidy programme by a limited number of certain enterprises." As China points out, in the original CVD investigation, the ADC identified in its specificity analysis the "program" at issue. China argues that the systematic granting of financial contribution to a limited group of producers of subject merchandise, as outlined by the ADC, did not suffice under Article 2.1(c) because it did not evince a plan or scheme of some kind. However, China identifies neither the additional evidence of a "plan or scheme" that the ADC was required to cite nor the basis under Article 2.1(c) for such a requirement. China does not identify a basis for the Panel to find that ADC's *de facto* specificity determination was inconsistent with the text of Article 2.1(c). If the Panel reaches the substance of China's claim (i.e., determines the claim to be within its terms of reference, despite the measure having been terminated), then it would need to evaluate whether an unbiased and objective investigating authority could have reached the conclusion that the subsidies conferred to the Chinese producers in question were limited in use.